Supreme Court, U.S.
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No. 90-1121

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOAN GODLOVE,

Petitioner,

vs.

BAMBERGER, FOREMAN, OSWALD, and HAHN, a general partnership, and ROBERT H. HAHN, FRED S. WHITE, ROBERT T. BODKIN, WILLIAM P. FOREMAN, CHARLES E. OSWALD, JR., JOHN R. BURKE, JR., JEFFREY R. KINNEY, GEORGE A. PORCH, ROBERT M. BECKER, and GEORGE MONTGOMERY, individually and as partners of the law firm of Bamberger, Foreman, Oswald and Hahn,

Respondents.

CORRECTED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pro Se Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of protected property rights in violation of the Due Process Clause of the Fifth Amendment:

(a) When the district judge who had been designated for service in another district after each of the judges sitting in the Southern District of Indiana recused himself or herself sua sponte entered an order under Rule 37(b)(2) dismissing petitioner's action with prejudice, without affording her an opportunity for a hearing on the record.

(b) Where petitioner's behavior would not support the Hammond Packing presumption.

(c) Where the sanction imposed was not specifically related to the particular "claims" which were at issue in the underlying discovery order.

(d) Where the Court of Appeals concluded, as a matter of law, that the sanction "took with it Counts II and V whether they had been properly dismissed previously under 12(b)(6) or not."

2. Whether a district judge's sua sponte recusal is subject to appellate review under 28 U.S.C. §§ 1291, 1292(b) or 1651.

3. Whether the waiver provision set forth in 28 U.S.C. § 455(e) signals Congress' intent to bestow upon litigants in federal court a statutory right to have a judge who might otherwise be disqualified

under 28 U.S.C. § 455(a) continue to sit in a case by means of a "remittal of disqualification" procedure upon agreement of the parties and their attorneys.

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 1

Constitutional provisions, statutes and court rules 2

Statement of the Case 5

Reasons for Granting the Writ . . . 35

1. There is a direct conflict between the Seventh Circuit's decision and prior decisions of this Court 35

   A. Petitioner was entitled to a hearing on the record . . 35

   B. Petitioner's behavior will not support the Hammond Packing presumption 40

2. Exercise of the Court's power of supervision is warranted in this instance 45

   A. Failure to afford petitioner a hearing on the record . . 45

   B. Failure of the Seventh Circuit to supervise the administration of 28 U.S.C. § 455 46

Conclusion 55

Appendix [separate volume]

TABLE OF AUTHORITIES

Cases: **Page**

Clay v. Doherty, 608 F.Supp. 295 (N.D. Ill. 1985) 54, 55

Ex parte American Steel Barrell Company, 230 U.S. 35, 33 S.Ct. 1007 (1913) 46

Godlove v. Bamberger, Foreman, Oswald and Hahn, 903 F.2d 1145 (7th Cir. 1990) 48

Hammond Packing Company v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 58 L.Ed. 530 (1909) . . . 44

Hampton v. City of Chicago, 643 F.2d 478 (7th Cir. 1981) . . 47, 48, 49

Hovey v. Elliot, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897) 36

In re National Union Fire Insurance Company, 839 F.2d 1226 (7th Cir. 1988) 54

In re United States, 666 F.2d 690 (1st Cir. 1981) 48

Insurance Corporation of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099 (1982) 40, 41, 42, 43, 44

Laubenheimer v. Factor, 61 F.2d 626 (7th Cir. 1932) 50

Logan v. Zimmerman Brush Company,
455 U.S. 422, 71 L.Ed.2d 265,
102 S.Ct. 1148 (1982) 36, 37, 38

Margoles v. Johns, 587 F.2d
885 (7th Cir. 1978) 38, 39, 40

Roadway Express, Inc. v. Piper,
447 U.S. 752, 65 L.Ed.2d 488,
100 S.Ct. 2455 (1980) 36, 37

SCA Services, Inc. v. Morgan,
557 F.2d 110 (7th Cir. 1977) 51

Societe Internationale v. Rogers,
357 U.S. 197, 2 L.Ed.2d 1255,
78 S.Ct. 1087 (1958) 36

United States v. Balistrieri,
779 F.2d 1191 (7th Cir. 1985) . . 10, 46

United States v. Nobel,
696 F.2d 231 (3d Cir. 1982) . . . 50, 51

Constitutional Provisions:

U.S. Const. amend. V 2

Statutes:

28 U.S.C. § 455 . . . . . 2, 46, 49

28 U.S.C. § 455(a) 49, 52, 54

28 U.S.C. § 455(e) 50, 51, 53

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 19

28 U.S.C. § 1331 5

28 U.S.C. § 1332 5

28 U.S.C. § 1651 16

Ind. Code § 22-5-3-1 7

Ind. Code § 22-6-3-1 . . . . . 7, 45

Ind. Code § 34-1-60-4 . . . . 3, 13, 31

Court Rules:

Fed.R.Civ.P. 12(b)(6) 44, 45

Fed.R.Civ.P. 37(b)(2) 3, 4, 39

Fed.R.Civ.P. 54(b) 19

S.D. Ind. R. A-8 8

Code Prof. Resp. DR-101(B) . 13, 31, 32

Ind. R. Prof. Conduct 1.6 . . . 4, 5, 32

Other Authorities:

H.R. Rep. No. 1453, 93d Cong.,
2d Sess. (1974) 47, 49, 52, 53

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 903 F.2d 1145.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the district court's order dismissing petitioner's entire cause of action under Rule 37(b)(2) was entered on June 6, 1990. An order extending the time for filing a petition for rehearing to July 5, 1990 was entered by the Court of Appeals on June 20, 1990. On August 9, 1990, that court denied petitioner's timely-filed corrected petition for rehearing.

An order extending the time for filing a petition for writ of certiorari to and including January 7, 1991, was entered by Associate Justice John Paul Stevens on November 1, 1990. The statutory provision believed to confer on this Court jurisdic-

tion to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

> No person shall . . . be deprived of . . . property, without due process of law.

U.S. Const. amend. V.

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > . . .
>
> (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455.

It shall be the duty of an attorney:

. . .

Fifth. To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client.

Ind. Code § 34-1-60-4.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

. . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2).

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing any criminal act; or
> >
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Ind. R. Prof. Conduct 1.6.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332, as well as 28 U.S.C. § 1331, because of diversity of citizenship, plaintiff being a citizen of Oklahoma and defendants, citizens of Indiana.

Multiple claims are asserted against an Indiana law firm and its partners in this

case by one of its former associates. Of the claims asserted in the original complaint, only one arose under federal law. The remainder were Indiana claims, a number of which presented issues of first impression. Among them were claims for retaliatory discharge,[1] breach of contract, interference with contractual relations, interference with a prospec-

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[1] The gist of the allegations forming the basis for the retaliatory discharge claims are that the Bamberger firm discharged petitioner in retaliation (1) for refusing to violate disciplinary rules to which she was subject as a lawyer admitted to practice in Indiana and Minnesota; for raising ethical issues; for questioning the conduct of lawyers, both in the Bamberger firm and out, which appeared to contravene provisions of the Code of Professional Responsibility; for resisting unethical conduct; and for reporting unprivileged knowledge of a lawyer's violation of a disciplinary rule to the appropriate authorities and (2) for filing a sex discrimination charge against the Mayo Clinic on behalf of herself and similarly situated professionals.

tively advantageous business relationship and two statutory claims.[2]

Four weeks after petitioner's complaint was filed, the Honorable Gene E. Brooks, Judge of the United States District Court for the Southern District of Indiana, requested the chief judge to transfer the case to another judge for the stated reason that "the Plaintiff, Joan Godlove, an attorney, (Cause No. EV 85-192-C) has appeared before me in court proceedings."

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[2] These claims relate to what the Bamberger firm did and failed to do following petitioner's discharge on July 1, 1983, namely its refusal to provide her with a letter setting forth the true reasons for her discharge after she had requested such a letter in the manner contemplated by the Indiana service letter statute, Ind. Code § 22-6-3-1, and its communicating by telephone six months later with one of petitioner's prospective employers, rather than responding to the Oklahoma firm's inquiry in the manner contemplated by the Indiana anti-blacklisting statute, Ind. Code § 22-5-3-1, with a written statement of the true reasons for the discharge.

No formal order of recusal, however, is to be found in the record.

Ten days later, the Clerk's office informed petitioner and respondents' counsel that the case had been reassigned to Judge S. Hugh Dillin, pursuant to Local Rule A-8, which provides that "[w]henever it becomes necessary to reassign any case, the chief judge shall refer the case to the clerk for reassignment."

During the following weeks, Judge Dillin and every other judge then sitting in the United States District Court for the Southern District of Indiana recused himself or herself[3] sua sponte without disclosing on the record the statutory

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[3] Other jurists opting out of this case were Judge William E. Steckler, Judge Sara Evans Barker, and Chief Judge James E. Noland.

grounds or factual basis for his action.[4]

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[4] On January 14, 1988, Plaintiff's Request that Judges of Southern District of Indiana Enter Orders Setting Forth the Statutory Ground(s) and Factual Basis for Their Disqualification and Reasons for Assignment of this Case to a District Court Which Did Not Have Ready Access to Indiana Law was filed. Among the reasons advanced for granting this request were that in ruling on a motion to dismiss certain claims presented in the amended complaint, Judge Beatty acknowledged that he was "hampered somewhat in [his] examination of Indiana law," Order (Feb. 12, 1986), at 4; that 28 U.S.C. § 455 and cases construing that statute indicated that a district judge is obligated not to recuse himself without reason just as he is obligated to recuse himself when there is a reason; and that unless the requested orders were entered, neither the former Chief Judge of the District Court nor the Seventh Circuit would be able to determine whether recusal was proper in each instance or whether assignment of this case to a district judge sitting in Illinois, rather than one sitting in the Northern District of Indiana might result in substantial prejudice to petitioner.

After noting that reporters containing Indiana decisions were, if needed, "approximately thirty minutes" away, the court adopted the argument advanced by defense counsel, i.e., that there is no authority for filing such a request; denied petitioner's request; and observed

On September 25, 1985, three months after the case had been filed, the Clerk noted for the record that the Honorable William L. Beatty, Judge of the United States District Court for the Southern District of Illinois, had been designated by Chief Circuit Judge Walter J. Cummings "for service in another district." By letter dated October 4, 1985, Judge Beatty notified the parties that the case had been assigned to him. In closing, the

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that it "would be highly inappropriate for this court to question their reasons for their recusal . . . ." Order (Feb. 16, 1988). App. 47. Petitioner's efforts to obtain appellate review of this decision were unavailing. App. 38-39; App. 50-51.

In light of the holding in United States v. Balistrieri, 779 F.2d 1191, 1205 n.14 (7th Cir. 1985), that the Seventh Circuit has "no jurisdiction to review a judge's order recusing himself unless the recusal would deprive the litigants of any opportunity to have their case heard at all," petitioner did not re-urge the recusal issue on appeal from the trial court's final judgment.

Illinois jurist remarked: "I would hope that it will not be necessary for us to gather in Evansville until the time of the trial and that motions or other arguments can be taken care of either by briefs or by telephone conferences."

In the course of fulfilling the duties assigned to him by Judge Cummings, the Illinois jurist made three separate trips to Indiana between October 4, 1985 and March 31, 1989: in December 1985, Judge Beatty traveled to Evansville, Indiana to hear arguments on Rule 12(b)(6), (e), and (f)[5] motions directed to petitioner's

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[5] Respondents urged the court to strike certain paragraphs of the original complaint on the ground that they contained scandalous matter, e.g., paragraphs alleging disciplinary rule violations. Rather than supporting their motion with affidavits countering those allegations, respondents asserted that because the alleged violations had never been the subject of a complaint filed with the Indiana Disciplinary Commission, the allegations are "subjective, speculative, utterly without foundation

original complaint; in December 1986, he traveled to Indianapolis to hear arguments on petitioner's motion to compel discovery and renewed Rule 12(b)(6) and (f) motions directed to the amended complaint; and on March 31, 1989 he returned to Indianapolis to conduct a pretrial conference, establish certain deadlines and discuss a fall 1989 trial setting.

At the March 1989 pretrial conference, Judge Beatty chose not to decide the Rule 37(b) (2) motion which the Bamberger firm filed in December 1987 after petitioner

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and merely serve to embarrass, humiliate and/or injure the reputation of members of the Indiana Bar in good standing..."

Although the trial court never ruled on this motion, it characterized Count I of the original complaint as containing "much material bordering on being scandalous." Order (Feb. 12, 1986) at 8. This "finding" is referred to by the Seventh Circuit in the third paragraph of its June 6, 1990 opinion.

failed to produce documents[6] described as

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[6] Requests No. 8, 9 and 10 were objected to by petitioner on her own behalf on the ground, among others, that the documents sought contained information encompassed by the work-product doctrine. Production of the documents sought by Request No. 2 and 9 was objected to on behalf of clients of the Bamberger firm on that and other grounds, including the attorney-client privilege, the statutory duty imposed on petitioner by Indiana Code § 34-1-60-4 "[t]o maintain inviolate the confidence, and, at every peril to [her]self, to preserve the secrets of [her] clients," and the parallel provision of Disciplinary Rule 4-101(B), which prohibited her from revealing "confidences" or "secrets" of her former clients, including those contained in the requested daybooks, to third parties, such as defense counsel, without the express consent of the clients in question. Petitioner did, however, offer to produce relevant entries in the daybooks if the firm demonstrated that she was no longer bound, under the applicable disciplinary rule, to treat those entries as "confidential information."

On November 11, 1987, after the court overruled these objections, petitioner filed a written request that the Bamberger firm notify clients she had represented of the pendency of the action and her assertion of the attorney-client privilege and work-product doctrine on their behalf. After the firm voiced its opposition, this request was denied by

follows in its Rule 34 request:

> Any lawyer's daybooks, diaries or calendars provided to Plaintiff by the Bamberger, Foreman, Oswald and Hahn (the "Bamberger Firm") or used by Plaintiff during her employment by the Bamberger Firm. [Request No. 2]
>
> All records, memoranda, notations, statements, summaries and all other documents relating to the matters in controversy which Plaintiff obtained from or as a result of interviewing any person purporting to have knowledge of the matters in controversy. [Request No. 8]
>
> Any notes or summaries of any kind made by Plaintiff at any time regarding meetings, conversations or communications of any kind to, from or with any Defendant. [Request No. 9]
>
> Any notes, summaries, comments or writings of any kind prepared at any time by Plaintiff regarding events or experiences, occurring during her tenure with the Bamberger Firm or any events or experiences in any way connected with or related to the Bamberger Firm. [Request No. 10]

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the court. This request was renewed at the time petitioner sought appellate review of the discovery orders upon which the Bamberger firm's Rule 37(b)(2) motion was based. See fn. 7, infra.

Instead, he held that motion in abeyance, noting that it would be ruled on "at the conclusion of the case," and said that he "[thought] it would be appropriate for [the Bamberger firm] to file some further motion, either to bar use of any documents or something along that line." Transcript of Proceedings 18:16-22; 39:2-13; 40:3-6 (Mar. 31, 1989).

On March 31, 1989, defense counsel represented to the court that he was ready to go to trial in September or October. Although he stated that he "would like to get the documents," no mention was made of his being unable to prepare for trial without them. Id. 39:22 - 40:2; 52:13 - 53:3; 54:23 - 55:2.

During the pretrial conference, when the subjects of petitioner's having raised a "work product" objection during her January 1988 deposition upon being questioned

about documents covered by Requests No. 9 and 10 and the magistrate's having stated that both sides should brief the issue before he ruled on the objection[7] came up, respondents' counsel informed the district court that he had not pursued the matter any further at the deposition and that he had "no intention of pursuing it further." Transcript of Proceedings 15:2 - 17:3;

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[7] Fourteen months earlier, when petitioner filed a motion seeking an extension of time to file a brief addressed to the "work product" issue raised during her deposition and in discovery orders entered by the court on September 28, 1987 and January 14, 1988, defense counsel led the court to believe that the magistrate had ruled on all objections raised during her deposition. Relying on this representation, the court denied petitioner's motion. Order (Feb. 25, 1988). This ruling prompted petitioner to file motions to stay enforcement of the district court's production orders and to seek appellate review of the rulings rejecting her work product and attorney-client privilege claims. The Seventh Circuit dismissed the appeal for lack of jurisdiction and declined to exercise its jurisdiction under the All Writs Act, 28 U.S.C. § 1651. App. 34-35.

17:10-18:11 (Mar. 31, 1989).

Two weeks later, with the prospect of having to respond to additional discovery requests and a fall trial fast approaching, respondents filed a Rule 37(b)(2) motion seeking dismissal of the remaining counts of the amended complaint, rather than an order precluding petitioner from offering the unproduced documents in evidence at trial. No attempt was made in the briefs filed in support of the law firm's motion to explain how nonproduction of these documents could have any impact on the correct decision of the remaining claims.[8] Rather, respondents raised the

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[8] For example, the Bamberger firm did not suggest to the court how "notes or summaries made by plaintiff regarding meetings, conversations or communications from any defendant" could have any material relevance to the Title VII claims, the equal pay claim or the two state law claims arising from the long distance telephone conversation between one of its partners and an Oklahoma attorney six months after the discharge.

possibility that production of the documents in question might aid them in their trial preparation:

> [T]he documents sought are of established relevance to the subject matter of this litigation and may be of great importance to Defendants in the preparation and presentation of their case.

Brief in Support of Second Application for Rule 37 Relief at 4.

On July 7, 1989, Judge Beatty, sitting in Alton, Illinois, granted the law firm's Rule 37(b)(2) motion and entered an order dismissing petitioner's entire cause of action.[9] App. 32-33. Petitioner's re-

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Nor did the firm counter the assertion made in petitioner's initial Rule 34 response that it had the substantial equivalent of the information sought via Request No. 2 in its possession in the form of billing statements.

[9] Of the claims asserted in the amended complaint, only five remained for disposition in the district court on July 7, 1989, when Judge Beatty decided to dismiss petitioner's action as a discovery sanction, i.e., the equal pay claim, two Title VII claims, and the two

quest for a hearing on that motion went unheeded. App. 90. So too did observations, made by petitioner during the pretrial conference and again in her brief in answer to respondents' Rule 37(b)(2) motion, that she had never been afforded an opportunity for a hearing on the record on the "work-product issues" raised in December 1987 and January 1988.[10] App. 70-

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claims arising out of the January 1984 telephone conversation between her former employer and a prospective employer. The other claims had been dismissed with prejudice on December 31, 1986.

Petitioner had filed motions requesting the district court to certify the dismissed claims for interlocutory appeal under Rule 54(b) and 28 U.S.C. § 1292(b). At respondents' urging, the district court adopted their proposed findings and denied both requests. Order (Feb. 25, 1988) ("[w]hile the legal theories in the counts that were dismissed may be different than those in the counts that were retained, all counts arise out of the same factual situation"); Order (Oct. 3, 1988).

[10] In commenting on the "work-product" issue raised during peti-

74; 90; Transcript of Proceedings 17:10-18:14 (Mar. 31, 1989).

Whether the district judge "heard" the petitioner at all, i.e., whether he reviewed her answer brief before deciding

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tioner's deposition, Magistrate Foster said:

> [I]n stormy seas one does not want to put a small boat, and I want to make sure, before I make that order, I don't want to induce, by my ruling, a waiver of that which a person's entitled to under this area.
>
> . . .
>
> [T]his issue, given the objection raised, should be briefed by both sides, given what you now know, and that there's no great rush at this point to have that answer today, and for that reason I'll allow the defendant to make further inquiry, either in the form of an interrogatory or in the continued deposition, whether it's in redirect or otherwise.

Partial Transcipt of Deposition of Joan Godlove 320:17-22; 322:3-11 (Jan. 22, 1988).

that "[t]he only sanction that would be meaningful in view of the entire history of this case is the extreme sanction of dismissal," is unclear. Errors contained in the sentences quoted below, which are the only direct references to the answer brief in the court's July 7, 1989 order suggest that the answer brief was seen through the eyes of a third person, e.g., a law clerk or respondents' counsel:

> On June 9, 1989, plaintiff filed her brief in response to defendant's second application for Rule 37 relief and on June 20, 1989, plaintiff filed a reply brief, with exhibits consisting of letters and other pleadings which plaintiff had filed in connection with the original request for production of documents and subsequent proceedings in relation thereto. In the conclusion of her brief she states: "Finally, the plaintiff renews the offer made in January, 1988 to provide the court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of this discovery order.

Order (July 7, 1989), p. 4, App. 24-25.

A cursory review of the plaintiff's answer brief will reveal that no exhibits were attached. App. 52-91. Instead, petitioner had endeavored to summarize facts relevant to the issues presented by the Bamberger firm's Rule 37(b)(2) motion in the opening section of her brief. App. 52-81. It is doubtful that the reference to "exhibits" is simply a typographical error, i.e., that the court meant to refer to "exhibits" attached to the defendants' reply brief. Only one exhibit is attached to that brief, a partial transcript of petitioner's January 1988 deposition, not "letters and other pleadings which plaintiff had filed in connection with the original request for production of documents and subsequent proceedings in relation thereto."

There are, however, two typographical errors in the district court's quotation

of the concluding sentence of petitioner's answer brief. The last three words in that sentence are "its discovery orders," not "this discovery order." App. 25, 90.

The court's interpretation of the final sentence of the answer brief appears to track the interpretation advanced by the Bamberger firm in its reply brief, i.e., that petitioner "claimed" that she had offered to produce all of the documents called for by Requests No. 2, 8, 9 and 10 for in camera review during her January, 1988 deposition, that that claim was false and that she was only offering to produce, for in camera review, notes related to her termination interview. App. 25, 32, 96-98. Once the final sentence in the answer brief is stripped of all reference to the deposition, it reads as follows: "the plaintiff offer[s] to provide the Court for its in camera inspection (or that of

Magistrate Foster) the documents which are the subject of its discovery orders."

In commenting further on the subject of in camera review, the court wrote, "Plaintiff finds fault with the court's order to produce certain material for in camera inspection by the court in order to determine her questions of privilege." App. 27. Perusal of the answer brief itself reveals that it contains nothing to support such a finding.

In its dismissal order, the district court stated that it had "considered the full record in this case in making a determination as to whether or not to impose sanctions and what sanctions to impose." App. 30-31. A comparison of what petitioner wrote the court on October 26, 1987, with what appears in the court's July 7, 1989 order raises questions which petitioner would have had an opportunity

to answer had there been the requested hearing on respondents' Rule 37(b)(2)(C) motion:

> Having done what I felt was required of me by the Code of Professional Responsibility (see Plaintiff's Brief in Response to Defendants' Motion to Compel Production of Documents, at p. 2; Plaintiff's Response to Defendants' First Request for Production of Documents, at pp. 2-4), and inasmuch as the attorney-client privilege belongs to the client alone, while the work product doctrine may be asserted by either the client or the attorney (see, e.g., In re Grand Jury, 106 F.R.D. 255 (D.N.J. 1985), I will not be submitting what you refer to on page 2 of your order of September 28, 1987 regarding the defendants Motion to Compel Production of Documents as "any claimed attorney client privilege material" to you for In Camera examination. . . .

Letter from Joan Godlove to Hon. William L. Beatty (Oct. 26, 1987). App. 62.

> In hindsight the court should probably have imposed sanctions on the plaintiff following her letter of October 26, 1987, when she stated: "I will not be submitting what you refer to on Page 2 of your order of September 28, 1987 regarding the defendants' motion to compel production of documents as 'any claimed

> attorney client privilege material' to you for in camera examination."

Order (July 7, 1989) at 5-6, App. 26-27.

In commenting on the district court's failure to conduct a hearing on the motion for sanctions, the Seventh Circuit wrote:

> Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse caused by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion. Margolis [sic] v. Johnson, 587 F.2d 885, 888-89 (7th Cir. 1978). . . .

App. 14-15.

The order entered by the district judge does not indicate whether he had entertained the thought of making yet another trip to Indiana to conduct a hearing on the motion for sanctions. Nor does the order suggest that the Illinois jurist had decided that there "was nothing left for

him to do at a formal hearing except waste more time of the court and defendants." His final order does suggest that he harbored certain doubts about the underlying discovery orders: "It may be that the court's orders of September 28 and December 23, 1987, were in error as contended by plaintiff, but, if this court is to maintain any control over the litigation and have it proceed in an orderly fashion to a final conclusion, its orders must be obeyed until reversed." App. 28.

Before granting what the district court characterized as "the extreme sanction of dismissal," it did not address any of the constitutional arguments raised by petitioner in her answer brief. Whether this constitutes further evidence that the district court did not consider that brief or that it relied once more on representa-

tions made by respondents' counsel is an unanswered question.

Among representations which might have persuaded the court not to trouble itself with the answer brief are the following:

> Plaintiff's brief in answer to Defendants' second application for Rule 37 relief is largely a replay of arguments made previously. Defendants have already responded to these arguments and the arguments have been rejected by the Court.
>
> Consequently, Defendants see no need or useful purpose to be served by replowing that familiar ground and instead invite the Court's attention to the briefs Defendants have filed previously regarding this matter.
>
> Plaintiff does raise two points, however, that are new.
>
> First, she contends that her position is parallel to that of the petitioner in Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, Attorney General, Successor to the Alien Property Custodian, et al., 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). . . .
>
> . . .
>
> Second, in her brief on this motion she claims that that [sic] at

> her deposition in January, 1988, she made an offer "...to provide the Court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of its discovery orders." . . .

Defendants' Reply to Plaintiff's Answer Brief on Defendants' Second Application for Rule 37 Relief at 1, 3-4. App. 92-93, 96-97.

The Bamberger firm's reply brief, like the district court's July 7, 1989 order, makes no mention of petitioner's "due process" arguments or the cases cited in support of those arguments. App. 92-99.

The reply brief does mention the "concern" which served as the basis for petitioner's failure to tender the documents in question to defense counsel:

> Plaintiff justifies her refusal to produce documents as ordered by the Court solely on her "concern" that complying with the Court's order would subject her to disciplinary proceedings in Indiana, where she no longer practices (except for this case). She makes no claim that by compliance with the Court's order

she would be subject to criminal prosecution.

To support her "concern" she offers nothing other than her own unique and peculiar understanding of Rule 1.6 of the Indiana Rules of Professional Conduct. Her "concern" is groundless; and to date, Plaintiff has not cited any authority in support of her interpretation of Rule 1.6.

Accepted principles in the law of privilege run directly counter to her position. The attorney-client privilege extends to agents and employees of an attorney. See Am.Jur. 2d, Witnesses, §§ 191, 217. Consequently, Defendants' counsel, as Defendants' agent, would not be a third party for purposes of disclosure.

The commentary of the rule also conflicts with Plaintiff's position. The commentary states: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." (Disciplinary Rule 4.101 (B), cited by Plaintiff, has not been in effect in Indiana since January 1, 1987. I.C. 34-1-15-4, also cited by Plaintiff, does not exist.)

App. 94-95.

Petitioner had mistakenly referred to "Indiana Code § 34-1-15-4," rather than

"Indiana Code § 34-1-60-4" in the opening section of her answer brief, when she made the following observation:

> Production of the documents sought by Requests No. 2 and 9 was objected to by the plaintiff on behalf of clients of the Bamberger firm on that and other grounds, including the attorney-client privilege, the statutory duty imposed on plaintiff by Indiana Code § 34-1-15-4 "[t]o maintain inviolate the confidence, and, at every peril to [her]self, to preserve the secrets of [her] client[s]," and the parallel provision of Disciplinary Rule 4-101(B), which prohibited her from revealing "confidences" or "secrets" of her former clients, including those contained in the requested daybooks, to third parties, such as defendants' counsel, without the express consent of the clients in question.

App. 54.

Although respondents' counsel did not say as much, implicit in his representation that "I.C. 34-1-15-4, also cited by Plaintiff, does not exist," is a representation that no Indiana statute exists which requires attorneys "[t]o maintain inviolate the confidence, and, at every

peril to himself, to preserve the secrets of his client." Implicit in the law firm's statement that "Disciplinary Rule 4.101(B), cited by Plaintiff, has not been in effect in Indiana since January 1, 1987," is the suggestion that nothing (i.e., Rule 1.6 of the Indiana Rules of Professional Conduct) took its place.

In addition to quoting the language found in Rule 1.6, which is set out on page 4-5, supra, in her answer brief, petitioner also sought to direct the district court's attention to additional authority supporting her position:

> The following excerpt from the official comments to Rule 1.6 of the Rules of Professional Conduct regarding "authorized disclosure" should make it clear to Mr. Scism, his clients, and this Court that the disclosure of information protected by the attorney-client privilege to Mr.Scism or any other lawyer associated with the Barnes & Thornburg firm cannot be said to have been "impliedly authorized" by clients of the Bamberger firm who were repre-

sented by the plaintiff while she was an associate of that firm:

> Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

(Emphasis supplied).

Moreover, as is apparent from the plain language of Rule 1.6, disclosures that are "impliedly authorized" by a client are disclosures which are necessary "to carry out the representation [of the client]," not the representation of the firm in a controversy between the firm and one of its former associates.

From the above it follows that if the plaintiff revealed information relating to her representation of a client of the Bamberger firm to Mr. Scism or any other attorney in the Barnes & Thornburg firm without first having obtained the client's consent after consultation, she would be subject to disciplinary proceedings for violation of the express provisions of Rule 1.6 of the Rules of Professional Conduct.

App. 78-79.

The Seventh Circuit, like the district court, indicated that it too had examined

the entire record. App. 17. Its review led it to make the following findings and conclusions:

> [P]laintiff willfully and deliberately chose to ignore and refuse to obey the court's orders. . . . We see nothing but willfulness in this record. Plaintiff does not dispute her noncompliance was deliberate. Her excuse is only that she knew better than the district judge what response she should make. The district court concluded that after more than eighteen months of intransigence, resistance, and disregard of court orders that no other sanction could be meaningful. We see no factual findings by the district court which could reasonably be considered clearly erroneous. The facts justifying dismissal are vividly apparent on the face of the record.
>
> No matter the standard of review, in this case, even under the strict de novo standard of review, we could not but approve the imposition of the dismissal sanction. The district court could have abused its discretion only in declining to impose the dismissal sanction with prejudice to bring an end to plaintiff's attempt to manipulate the progress of her case to suit herself. . . .

(Citations omitted). App. 17-18.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the Seventh Circuit's decision and prior decisions of this Court.

A. Petitioner was entitled to a hearing on the record.

In rejecting petitioner's argument that the district court should not have entered an order dismissing her entire cause of action without affording her an opportunity for a hearing on the record, the Court of Appeals for the Seventh Circuit wrote:

> Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse cause by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion. . . .

App. 14-15.

To reach this conclusion required the panel charged with reviewing this case to ignore a long line of cases decided by

this Court, among them Hovey v. Elliot, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897); Societe Internationale v. Rogers, 357 U.S. 197, 2 L.Ed.2d 1255, 78 S.Ct. 1087 (1958); Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455 (1980); and Logan v. Zimmerman Brush Company, 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982).

In Rogers, this Court clearly recognized that considerations of constitutional due process limit a court's authority to impose any discovery sanction. 357 U.S. at 209, 78 S.Ct. at 1094. To comply with the requirements of due process mandated by the Fifth Amendment, federal courts must provide fair notice and an opportunity for a hearing before imposing sanctions. See generally Roadway Express, Inc. v. Piper, supra, where this Court, after holding that attorney's fees

should not be assessed lightly or without fair notice and an opportunity for a hearing on the record, stated:

> The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.

752 U.S. at 767 n.14, 100 S.Ct. at 2464 n.14.

If there was ever any doubt that a cause of action is a species of property protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, it should have been dispelled by the Court's discussion of that subject in Logan v. Zimmerman Brush Company. In delivering the opinion of the Court, which concluded that the appellant was deprived of a protected property right in violation of the Due Process Clause of the Fourteenth Amendment, Justice Blackmun noted:

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants

> hoping to protect their property or as plaintiffs attempting to redress grievances. In Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), for example--where a plaintiff's claim had been dismissed for failure to comply with a trial court's order --the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id., at 209, 78 S. Ct. at 1094. See also Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-351, 29 S.Ct. 370, 379-380, 58 L.Ed. 530 (1909) (power to enter default judgment); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (same); Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1876) (same). Cf. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

455 U.S. at 429, 102 S.Ct. at 1154.

This case stands in sharp contrast to Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978), the case the Seventh Circuit relied on in holding that Judge Beatty did not abuse his discretion in entering a Rule

37(b)(2)(C) dismissal without affording petitioner an opportunity for a hearing on the record. A review of the Margoles opinion reveals that the trial court heard oral arguments on defendants' Rule 37(b)(2)(C) motion and considered "affidavits, briefs and arguments of counsel" before making the following specific finding:

> that the failure to produce herein is willful, that it is prejudicial, that the matter sought to be produced is highly relevant and material to the case and it was and is within plaintiff's control, and that the failure to produce that and to comply with the procedural orders of the Court has been so prejudicial that the sanction [of dismissal] is appropriate.

587 F.2d at 886-87 (quoting oral ruling announced after oral argument).

What the Seventh Circuit may have had in mind when it cited Margoles in its opinion in this case is that portion of the Margoles opinion which pertains to the evidentiary hearing sought by plaintiff in

connection with his Rule 60(b) motion to set aside the earlier Rule 37 dismissal. On the subject of whether a second hearing was necessary, the Margoles panel wrote:

> Upon a full review of the record, however, we are constrained to agree with the district court that a hearing at which further oral argument and testimony were given was not required. The briefs and affidavits fully recounted the circumstances surrounding the noncompliance with the court's order. Any further testimony would have been cumulative. We find no abuse of discretion in the district court's ruling that such a hearing was not appropriate.

587 F.2d at 889 (emphasis supplied).

B. Petitioner's behavior will not support the Hammond Packing presumption.

This Court's holding in Insurance Corporation of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099 (1982), was brought to the attention of the Court of Appeals by petitioner's counsel and cited for the proposition that the Due Process Clause places

at least two other limitations on a district court's power to impose discovery sanctions: "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707, 102 S.Ct. at 2107.

Although the panel concluded that the district court was "justified" in dismissing petitioner's entire cause of action as a discovery sanction, it did not make a specific finding that the sanction was "just," when measured by constitutional standards, or that the sanction was "specifically related to the claims at issue in the order to provide discovery," i.e., the claims which remained following the trial court's December 31, 1986 ruling on the law firm's Rule 12(b)(6) motion.

In commenting on these constitutional standards in Insurance Corporation of Ireland v. Compagnie des Bauxites, Justice White wrote:

> Rule 37(b)(2) contains two standards--one general and one specific--that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of Hammond Packing, supra, the former represents the general due process restrictions on the court's discretion.

456 U.S. at 708, 102 S.Ct. at 2107.

This Court took great pains in its decision in Insurance Corporation of Ireland to clarify standards to be used by trial courts asked to apply Rule 37(b)(2) to litigants appearing before them, as well as by appellate courts whose jurisdiction is invoked to assure that sanctions which are imposed by lower courts are not meted

out as a form of "punishment" for failure to obey particular discovery orders:

> Rule 37(b)(2)(A) itself embodies the standard established in Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), for the due process limits on such rules. There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. Such a rule was permissible as an expression of "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered . . . [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." Id., at 350-351, 29 S.Ct. at 380.
>
> The situation in Hammond was specifically distinguished from that in Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of

> the defendant will not support the Hammond Packing presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See Societe Internationale v. Rogers, 357 U.S. 197, 209-213, 78 S.Ct. 1087, 1094-1096, 2 L.Ed.2d 1255 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see Part III), then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver.

456 U.S. at 705-06, 102 S.Ct. at 2105-06.

The behavior detailed in the record below will not, as a matter of law, support the Hammond Packing presumption with regard to the claims[11] before the district court on July 7, 1989.

As for the claims dismissed on December 31, 1986, pursuant to Rule 12(b)(6), they clearly were not the subject of discovery orders entered by the district court in 1987 or 1988 and, therefore, could not be

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[11] See footnotes 8 and 9, supra, and text accompanying footnote 8.

disposed of as a discovery sanction without violating petitioner's Due Process rights. Nonetheless, the Seventh Circuit held that the sanction order "took with it Counts II and V[12] whether they had been properly dismissed previously under 12(b)(6) or not." App. 5.

2. Exercise of the Court's power of supervision is warranted in this instance.

A. Failure to afford petitioner a hearing on the record.

The arguments set forth in the preceding section are adopted by reference in support of petitioner's contention that the exercise of this Court's supervisory

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[12] Counts II and V present claims which raise issues of first impression, among them, whether the Indiana Supreme Court would recognize (1) a wrongful termination claim where a lawyer alleged she was discharged for refusing to violate disciplinary rules or (2) a common law claim for damages proximately caused by a law firm's violation of the Indiana service letter statute, Ind. Code § 22-6-3-1. See footnotes 1 and 2, supra.

powers is warranted because the Court of Appeals sanctioned the district court's departure from the accepted and usual course of judicial proceedings.

B. Failure of the Seventh Circuit to supervise the administration of 28 U.S.C. § 455.

Although this Court denied a petition for mandamus to review the grant of a motion for disqualification due to bias and the appointment of new judge by the senior circuit judge in Ex parte American Steel Barrell Company, 230 U.S. 35, 45, 33 S.Ct. 1007 (1913), it noted in dictum that review was possible "in due course" if the action taken was unauthorized by law.

Because the Seventh Circuit declined to assume jurisdiction over the interlocutory appeal brought by petitioner in 1988 (and in light of its 1981 holding in United States v. Balistrieri, supra, that recusal decisions are not reviewable on appeal

from final decisions), petitioner was unable to secure any review whatsoever of the five sub silentio recusals in this case.[13]

As a consequence of the Seventh Circuit's decision not to review the serial recusals in this case after being urged to do so, district judges sitting in Indiana, Illinois, Wisconsin, and perhaps elsewhere may be more inclined to recuse themselves for statutorily impermissible reasons to avoid sitting on difficult or controversial cases. But see H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) reprinted in U.S. Code Cong. & Admin. News, 1974, pp. 6351, 6355.

The Seventh Circuit's hands off policy will also serve to reinforce obiter dictum in Hampton v. City of Chicago, 643 F.2d

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[13] See footnotes 3 and 4, supra, and accompanying text.

478, 480 n.7 (7th Cir. 1981), that district judges are under no obligation to provide a statement of reasons for recusal. Compare Godlove v. Bamberger, Foreman, Oswald and Hahn, App. 10 (interlocutory appeal dismissed where "plaintiff sought to require all the district judges in Indiana who had disqualified themselves to give the reasons for their disqualifications") with In re United States, 666 F.2d 690, 695 (1st Cir. 1981) (although disqualification decisions "are in the first instance committed to the district judge," the test employed to determine if he abused his discretion is whether the decision can be "defended as a rational conclusion supported by a reasonable reading of the record").

The effect of the practice approved by the Seventh Circuit is and will be to deprive this Court, as well as the Seventh

Circuit, of any means of supervising the administration of 28 U.S.C. § 455(a) in that circuit in cases where a district judge, rather than a party invokes its provisions. Those who had a hand in drafting § 455, however, appear to have contemplated that recusal decisions would be subject to appellate review. See H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) reprinted in U.S. Code Cong. & Admin. News, 1974, pp. 6351, 6355.

In Hampton, the Seventh Circuit noted in dictum that "[i]f it should even appear that unfounded recusals impede the administration of justice in the circuit, the circuit council would take appropriate action, but the interest being vindicated would be that of the public in the administration of justice, and not the interest of a particular litigant." 643 F.2d at 479.

The facts of this case suggest that particular litigants may, indeed, be prejudiced by unfounded recusals, e.g., the judge assigned to the case may not have access to controlling state law and, thus, may treat questions of law which is not only foreign, but also inaccessible to him as questions of fact and base his legal decisions on the testimony of experts, as was the case in Laubenheimer v. Factor, 61 F.2d 626 (7th Cir. 1932), or accept, without question, arguments presented by certain advocates appearing before him. The "designated judge" might also elect not to conduct hearings at a distant courthouse on motions he would ordinarily hear in his own court simply because of the impact travel would have on his caseload.

Most courts construing 28 U.S.C. § 455(e) view it as a defensive provision. See, e.g., United States v. Nobel, 696

F.2d 231, 236-37 (3d Cir. 1982) (for purposes of waiving disqualification of a judge under § 455(a) if impartiality might reasonably be questioned, it is sufficient if the judge provides full disclosure of his relationship at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion; the election to proceed after full disclosure of the relevant facts satisfies those requisites and constitutes an effective waiver under § 455(e)); SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (§ 455 is mandatory in requiring that judge disqualify himself in certain circumstances and, hence, may not be defeated by waiver and estoppel).

However, when § 455(e) is viewed in light of its legislative history, it becomes apparent that by its adoption,

Congress also intended to bestow upon litigants in federal courts a right to be heard on the issue of judicial disqualification under § 455(a). See H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) reprinted in U.S. Code Cong. & Admin. News, 1974, pp. 6351, 6357, where the following observations were made regarding the new waiver provisions:

> Subsection (e) of the amended statute prohibits a judge from accepting from the parties a waiver of his disqualification where it is based on any of the specific situations set forth in subsection (b) of the amended statute. However, where the basis of disqualification is because "his impartiality might reasonably be questioned" a waiver is permitted after a full disclosure on the record of the basis for disqualification.

(Emphasis supplied).

Reference to "'remittal of disqualification' upon the agreement of the parties and their attorneys" is found in various communications transmitted to the Commit-

tee on the Judiciary during its consideration of the proposed amendment, including a report from the Department of Justice and the Report of the Joint Committee on the Code of Judicial Conduct. Id. at pp. 6358, 6360, 6361. Although the procedures contemplated by the Joint Committee for accomplishing a remittal of disqualification are not described in the report itself, this Court, could most certainly establish clear and precise guidelines to be followed by litigants who elect to exercise their rights under subsection (e) after the necessary disclosure has been made on the record.

If, indeed, the waiver provision found in subsection (e), as it relates to disqualification for the "appearance of partiality" or "lack of impartiality," is to be of any real benefit to litigants and the judicial system as a whole, litigants

must be afforded an opportunity to use it and, thus, have a say in the matter. As the panel in In re National Union Fire Insurance Company, phrased it, "let counsel speak or keep silence as they will" after the judge has disclosed on the record the details he deems significant. 839 F.2d 1226, 1231 (7th Cir. 1988).

If the litigants are confident that a district judge, who might otherwise disqualify himself under subsection (a), is capable of proceeding impartially, what interest does the judicial system, the public or that judge have in seeing him step down?

As Judge Shadur noted not long ago, confidence in the impartiality of judicial proceedings "is as much sustained by conduct indicating a judge's ability to proceed impartially, notwithstanding casual prior acquaintance or knowledge, as

by withdrawal from cases in which his or her ability to make independent judgments is open to reasonable doubt. Any habit of too ready recusal would foster at best the impression of a timid judiciary and at worst cynicism about its fundamental capacity for impartiality. In either instance the result must be a diminution of public confidence in the courts." Clay v. Doherty, 608 F.Supp. 295, 299-300 (N.D. Ill. 1985).

CONCLUSION

For the reasons set forth above, petitioner submits that this Court should grant the writ sought herein and decide the issues presented by this case.

Respectfully submitted,

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Pro Se Petitioner

90-1121

No. _____

FILED
JAN 7 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOAN GODLOVE,

Petitioner,

vs.

BAMBERGER, FOREMAN, OSWALD, and HAHN, a general partnership, and ROBERT H. HAHN, FRED S. WHITE, ROBERT T. BODKIN, WILLIAM P. FOREMAN, CHARLES E. OSWALD, JR., JOHN R. BURKE, JR., JEFFREY R. KINNEY, GEORGE A. PORCH, ROBERT M. BECKER, and GEORGE MONTGOMERY, individually and as partners of the law firm of Bamberger, Foreman, Oswald and Hahn,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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101 pp

APPENDIX - TABLE OF CONTENTS

Page

Opinion, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 89-2722 (7th Cir. June 6, 1990) . . . . . App. 1

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. EV 85-192-C (S.D. Ind. July 7, 1989) . . . . . App. 20

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 88-1621 (7th Cir. Aug. 8, 1988) . . . . . App. 34

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 88-1785 (7th Cir. Apr. 27, 1988) . . . . . App. 36

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 88-1785 (7th Cir. May 16, 1989) . . . . . App. 38

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 89-2722 (7th Cir. June 20, 1990) . . . . . App. 40

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 89-2722 (7th Cir. Aug. 9, 1990) . . . . . App. 42

Letter from Hon. William L. Beatty to Joan Godlove and D. Reed Scism (Oct. 4, 1985) . . . . . App. 44

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. EV 85-192-C (S.D. Ind. Feb. 16, 1988) . . . . . App. 46

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 88-1785 (7th Cir. June 12, 1989) . . . . . App. 48

Order, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., No. 88-1785 (7th Cir. Aug. 9, 1989) . . . . . App. 50

Plaintiff's Brief in Answer to Defendants' Second Application for Rule 37 Relief for Failure to Produce Documents, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., S.D. Ind. No. EV 85-192-C (June 7, 1989) . . . App. 52

Defendants' Reply to Plaintiff's Answer Brief on Defendants' Second Application for Rule 37 Relief, Godlove v. Bamberger, Foreman, Oswald and Hahn, et al., S.D. Ind. No. EV 85-192-C (June 20, 1989) . . App. 92

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

NO. 89-2722

JOAN GODLOVE,

Plaintiff-Appellant,

v.

BAMBERGER, FOREMAN, OSWALD, AND HAHN, a general partnership, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 85-C-192 - William L. Beatty, Judge[1]

ARGUED APRIL 11, 1990
DECIDED JUNE 6, 1990

Before WOOD, JR., EASTERBROOK, and KANNE, Circuit Judges.

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[1] The Honorable William L. Beatty, United States District Judge for the Southern District of Illinois, was assigned to this case after every judge in the Southern District of Indiana recused himself or herself.

WOOD, JR., Circuit Judge. There is an old adage that "one who is his own lawyer has a fool for a client."[2] So it is in this case even though plaintiff, Joan Godlove, is a summa cum laude graduate of the Indiana University School of Law, and a member of the bar. This lawyer should have declined to represent this client.

Plaintiff was hired as an attorney by the defendant law firm, Bamberger, Foreman, Oswald & Hahn, in January 1981 and fired in July 1983. In June 1985, she brought this pro se action against her former firm and certain named partners alleging on eight different grounds that her dismissal was unjust. The defendant law firm wisely took heed of the adage and secured outside legal assistance.

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[2] Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

I. CASE HISTORY

There is no need to set forth all the pretrial exercises detailed in the record which is a foot and a half high, but some background is necessary.[3] Plaintiff began this diversity action in June 1985 with a fifty-three page complaint. The district court dismissed the complaint, characterizing it as a "lengthy meandering" statement of facts, with much "irrelevant material" and "bordering on being scandalous." In granting leave to file an amended complaint, the court made clear what is expected in a complaint. The amended complaint was also fifty-three pages long. The court let it stand, but our comparison of the two complaints evidences little regard for the court's advice and the customary requirement for "a short and plain

[3] We accept plaintiff's figures that there are over three-hundred pleadings and orders in the record.

statement of the claim . . . ." Fed.R. Civ.P. 8(a).[4] In December 1986 the court dismissed with prejudice Counts I, II, IV, and V of the amended complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The other counts, III, VI, VII, and VIII remained. In July 1989 the district court, upon the second application by defendants for sanctions under Fed. R. Civ. P. 37, dismissed "this cause of action"

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[4] The amended complaint alleged the following claims:

> I. Breach of Employment Contract; II. Unjust Dismissal in Retaliation for the Exercise of Protected Activities; III. Violation of the Equal Pay Act (29 U.S.C. § 206(d)(1)); IV. Interference with Contractual Relations; V. Violation of the Indiana Service Letter Statute (Ind. Code § 22-6-3-1); VI. Violation of the Indiana Blacklisting Statute (Ind. Code § 22-5-3-1); VII. Violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.); and VIII. State Common Law Claim for Interference with Prospective Advantage.

with prejudice at plaintiff's costs. Plaintiff raises on appeal the 12(b)(6) dismissal of Counts II and V (Counts I and IV are abandoned), and the rule 37 dismissal of the cause of action.

Although we view the appeal of the 12(b)(6) dismissals to be without merit, we need only consider the rule 37 dismissal sanction for which purpose the district judge considered the whole record and particularly the discovery difficulties. That sanction took with it Counts II and V whether they had been properly dismissed previously under 12(b)(6) or not. The district court found that each step of the discovery process had been a "monumental exercise" in briefs, motions, and extensions of time, and concluded that plaintiff had "willfully and deliberately" ignored and refused to obey the orders of the court. We must look briefly at some of the events that led to the district

court's conclusion. A mere outlining of a portion of the record will serve to justify the dismissal.

> February 5, 1987--Defendants served on plaintiff their first request for production of documents containing twelve particular items. Plaintiff received an agreed extension of time and then objected to all the items sought. In September 1987, the district court found one of plaintiff's "wholesale" objections to be "specious" and that the others "bordered on being frivolous."
>
> June 12, 1987--After the parties failed to resolve their document production problems, defendants filed a motion to compel production.
>
> June 14, 1987--Plaintiff served on defendants a response offering to produce some of the documents requested but only on condition that defendants' counsel furnish her a statement "indicating that his client would furnish plaintiff with documents she wanted."
>
> September 3, 1987--After receiving additional extensions of time plaintiff filed her brief in opposition to defendants' motion to compel production.
>
> September 28, 1987--The district court overruled all of plaintiff's objections except two, a claim of attorney-client privilege and a work product objection. The district court ordered plaintiff to submit to the court for in camera examination those documents she claimed were protected by the attorney-client

privilege. The court also ordered plaintiff to submit to the court and defendants' counsel a list of the claimed work product items, identifying them in sufficient detail to enable the court to rule on that objection. The district court also commented that plaintiff appeared to completely misapprehend discovery.

October 26, 1987--Plaintiff responded to the district court's September 28 order by letter in which she informed the court she was refusing to submit any material for in camera inspection and was claiming as work product items only those notes she had made in anticipation of litigation.

November 4, 1987--The district court ordered that plaintiff's second set of interrogatories be stricken and that she pay defendants' fees and costs related to the interrogatories because of the number, the irrelevance of many of them, and because they went beyond the scope of reasonable discovery contemplated by the rules. The court subsequently held a hearing on the amount of the fees and costs, but plaintiff advised the court she would not pay the expenses pending the outcome of a final appeal in the case.

November 23, 1987--Plaintiff served her "Plaintiff's Post-Ruling Response to Defendant's First Request for Production of Documents." In that pleading she ignored some of defendants' requests, partially responded to one request, and again raised her prior objections.

December 8, 1987--Defendants applied for rule 37 assistance because of plaintiff's failure to comply with certain of the requests as ordered by the district court.

December 23, 1987--The court issued an order responding to the defendants' rule 37 sanction request. The district court expressed its difficulty in believing that plaintiff would deliberately ignore the court's prior order but excused plaintiff on the assumption that her refusal to comply resulted from some type of misunderstanding. The court then specifically and plainly directed plaintiff to respond to the various requests within certain time limits. Failure to do so, the court warned, would result in the court's proceeding to consideration of the rule 37 relief sought by defendants.

December 24, 1987--After defendants' attempts to arrange plaintiff's deposition had failed, the district court issued an order scheduling plaintiff's deposition for January 21, 1988. Plaintiff failed to appear after giving notice to opposing counsel only that morning. There were further difficulties before defendants were finally able to take her deposition.

February 3, 1988--After plaintiff failed to comply with the December 1987 order, defendants filed their "Request that Court Proceed on Defendants' Request for Rule 37 Relief."

March 3, 1988--The district court wrote plaintiff, noting her disregard of its orders and advising her that unless she responded to the orders immediately,

the court would rule on defendants' application for rule 37 relief.

December 21, 1988--the district court struck a number of plaintiff's 180 requests for admissions by defendants, commenting in its order that plaintiff's requests were prolix, argumentative, and appeared to be aimed more at harassing and embarrasing the individuals to whom the requests were directed than at simplifying the issues.

March 31, 1989--Defendants reported that plaintiff had still not complied, and the court suggested defendants file a current application for rule 37 relief.

April 14, 1989--Defendants filed their second application for rule 37 relief specifically seeking dismissal with prejudice and their costs.

June 14, 1989--Briefing on the second application was completed.

July 7, 1989--After considering the procedural history of the case, the district court issued its order as a rule 37 sanction dismissing plaintiff's cause of action with prejudice.

In addition to the problems outlined above, the record reveals that plaintiff also resisted various orders of the court by moving to reconsider and vacate about a half-dozen of those orders. One order

plaintiff sought to vacate was a denial of her request that defendant firm be required to notify its clients of her cause of action and her assertion in behalf of defendants' clients of the attorney-client privilege and work product doctrine. That effort of hers was unsuccessful. Plaintiff also filed two interlocutory appeals, both of which this court dismissed on its own motions. In one appeal, plaintiff sought to require all the district judges in Indiana who had disqualified themselves to give the reasons for their disqualifications. In the other, plaintiff expressed her dissatisfaction with not getting an extension of time to file a brief on the work product issue.

II. ANALYSIS

After considering that brief outline of the procedural history and plaintiff's conduct of her own case little more should

be needed to justify what a very patient trial judge, experienced on both the state and federal benches, felt compelled to do. Plaintiff left him no alternative but to dismiss her suit. Plaintiff's recalcitrance and obstruction of the case she initiated cannot be tolerated particularly from one who should know better.

For this appeal plaintiff did secure counsel who well represented his client in a difficult situation. Plaintiff's counsel sets forth the basic sanction law.[5] Whether to sanction and the sanction to be imposed are decisions entrusted to the discretion of the district court, Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 283 (7th Cir. 1988) (per curiam). The "discretion given to the district

[5] Plaintiff observes that the underlying discovery orders, the disobeying of which give rise to a sanction, must themselves be correct, but plaintiff does not challenge the underlying discovery orders in this case.

court is broad," Tamari v. Bache & Co., 729 F.2d 469, 472 (7th Cir. 1984). That discretion, however, "is not unfettered." Scheilling [sic] v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 275 (7th Cir. 1986). The sanction must be "just" and specifically related to the particular claim at issue in the discovery order. Insurance Corp. of Ireland, Ltd. v. Compagnie des Baxites [sic], 456 U.S. 694, 707 (1984) [sic]. It must also be remembered that unexcused and willful violations justify harsh sanctions up to and including dismissal with prejudice. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam). It is plaintiff's position against that legal backdrop, though it is conceded that she failed to comply with the court's discovery orders, that the most severe sanction -- the "draconian sanction of dismissal" -- was not

justified. We view the district court's decision to impose rule 37 sanctions under an abuse of discretion standard. Magnus Elec. v. Masco Corp., 871 F.2d 626, 631 (7th Cir. 1989).

To support that position plaintiff raises several arguments. It is implied in plaintiff's briefs that since her trial court actions were pro se that circumstance should be considered. Ordinarily, we treat the efforts of pro se applicants gently, but a pro se lawyer is entitled to no special consideration.

Plaintiff argues that her refusal to comply with the discovery orders was "not made in a fit of intransigence," but resulted from her "heartfelt belief" that her compliance would violate duties imposed on her by the Rules of Professional Conduct governing members of the Indiana bar and would result in a waiver of the work product doctrine and the attorney-

client privilege. Plaintiff undertook to make those decisions for the court. She refused to afford the court the ordered opportunity for in camera examination or to submit a list of what she claimed were work product materials. Plaintiff need not further concern herself with those doctrines as for her they are no longer at risk. It was the district court, not plaintiff, that had the responsibility to make those discovery production determinations on the merits.

Plaintiff also complains she was sanctioned without benefit of a hearing. Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse caused by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for

the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion. Margolis [sic] v. Johnson, 587 F.2d 885, 888-89 (7th Cir. 1978). We decline plaintiff's invitation to revisit that decision.

Plaintiff had been amply warned about the increasing likelihood of sanctions. She should have foreseen the possibility of dismissal. In the second request for rule 37 relief filed on April 14, 1989, defendants specifically asked for dismissal with prejudice. Any last minute change of mind by plaintiff to partially comply, to the limited extent she saw fit, with the court's order was too little too late. Plaintiff can not dictate her own terms of compliance with the court's order. Plaintiff may compromise with the defendant but not with the court. Her in-

adequate last minute "compliance" attempt was properly rejected.

Plaintiff claims that the district court should have experimented with some lesser sanction before dismissal. Plaintiff overlooks that an earlier monetary sanction was imposed but she promptly notified the court she would not pay until after she had taken an appeal. The first sanction obviously had no curative impact on her. She continued to be obstructive. There is no reason to believe that some other sanction would have been effective in causing plaintiff to progress in an orderly fashion with this litigation. The district judge is not to be faulted now for his patient efforts with plaintiff, nor will we be drawn into quibbling about a phase [sic] or two of the district judge taken out of context which plaintiff now claims misled her in some way to expect something less than dismissal.

After our own examination of the entire record, it would be impossible to come to any other conclusion than that plaintiff willfully and deliberately chose to ignore and refuse to obey the court's orders. Societe Internationale v. Rogers, 357 U.S. 197, 212 (1957), limits sanctions to situations where the noncompliance is willful and not due to inability of the party to comply. We see nothing but willfulness in this record. Plaintiff does not dispute her noncompliance was deliberate. Her excuse is only tnat she knew better than the district judge what response she should make. The district court concluded that after more than eighteen months of intransigence, resistance and disregard of court orders that no other sanction could be meaningful. We see no factual findings by the district court which could reasonably be considered clearly erroneous. Handamon [sic] v. National-Ben Franklin Life Ins.

Corp., 677 F.2d 617, 621 (7th Cir. 1982). The facts justifying dismissal are vividly apparent on the face of the record.

This court has recognized that the choice of sanctions is primarily the responsibility of the district judge, Patterson, 852 F.2d at 283. Sanctions are reviewed under a differential standard. No matter the standard of review, in this case, even under the strict de novo standard of review, we could not but approve the imposition of the dismissal sanction. National Hockey League, 427 U.S. at 640-41. The district court could have abused its discretion only in declining to impose the dismissal sanction with prejudice to bring an end to plaintiff's attempt to manipulate the progress of her case to suit herself. This is not a case as in our recent case of Diehl v. H.J. Heinz Co., No. 89-2165 (7th Cir. Apr. 14, 1990) in which this court determined that the

condition imposed by the district court was so unreasonable that it could not be complied with and therefore failure to comply did not justify sanctions.

The district court's decision under rule 37 to sanction plaintiff by dismissing her case with prejudice is affirmed. We remand to the district court for such further proceedings as may be necessary in relation to costs.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JOAN GODLOVE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. EV 85-192-C
	)	
BAMBERGER, FOREMAN,	)	
	)	
OSWALD & HAHN, a	)	
	)	
partnership, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the court is "Defendants' Second Application for Rule 37 Relief for Failure to Produce Documents" which was filed on April 17, 1989. On or about February 5, 1987, the defendants filed their first request for production of documents. The plaintiff filed objections to most if not all of the requests and on September 28, 1987, the court entered an order overruling most of plaintiff's objections to the

requests and with respect to Request No. 2, 8, 9 and 10, which are the subject of the present motion, said:

> With respect to Request No. 2 which calls for day books, diaries or calendars provided to the plaintiff by the defendants during her employment, she objects that as to the calendar it is not in her possession but fails to identify the person who has possession of it and as to the other items contends that they are not relevant and contain information that is either privileged or work product. If, in fact, the diaries do contain matters communicated to the plaintiff as an attorney by a client, she may submit that material for an in camera examination. Her objection on the ground that the material is work product is as defendants say, specious. The objection is therefore overruled with the exception that any claimed attorney client privilege material may be submitted for in camera examination.

and with respect to Request No. 8, 9 and 10:

> Request No. 8 calls for record, memoranda, notations, statements, etc., relating to the matters in controversy which plaintiff obtained from or as a result of interviewing any person purporting to have knowledge of the matters in controversy. Since the plaintiff has not identified the material which might be responsive to this request,, it is

> impossible for the court to rule on her blanket objection. We therefore order the plaintiff to submit within ten (10) days of this order to the court and to the defendants a list of the items which are called for under this request, identifying them in detail with sufficient information so that the court may rule on her work product objections.
>
> Request No. 9 calls for notes or summaries made by the plaintiff regarding meetings, conversations or communications from or with any defendant. Defendants [sic] objection is overruled. As defendants note in their brief there is no explanation as to why these would not be in plaintiff's custody or control or no suggestion as to who has custody or control of them. These documents would have been made of necessity at some period of time prior to the time litigation was contemplated.
>
> Request No. 10 calls for notes, summaries, comments or writings regarding events or experiences during her tenure with the Bamberger Firm and for any written observations or impressions regarding the defendant firm. The same reasoning applies to this request as to Request No. 9 and the objection is therefore overruled

On December 8, 1987, defendants filed their first application for Rule 37 relief based on plaintiff's failure to comply with the order of September 28, 1987. On

December 23, 1987, the court entered an order with respect to Request No. 2, 8, 9 and 10 and said in part:

> . . . It is difficult for the court to believe that plaintiff would deliberately ignore the court's order (Order of September 28, 1987) and we will operate on the assumption that her refusal to comply is the result of some type of misunderstanding. To obviate that situation the plaintiff is hereby specifically ordered to produce the documents and the material encompassed by Request No. 2 either to the defendant or to the court for an in camera examination within ten (10) days of the date of this order. The plaintiff is ordered to produce to the defendant within ten (10) days of the date of this order a list of the items called for in Request No. 8 identifying them in detail with sufficient information so that the court may rule on her work product objection. Plaintiff is ordered to produce to the defendant for their inspection and examination, all material encompassed by defendants' Request No. 9. The plaintiff is required to produce to the defendants for their inspection and examination all material called for under Request No. 10.

On March 3, 1988, the plaintiff having not complied with the order of September

28, 1987 or December 23, 1987, the court wrote the plaintiff and said:

> There is still pending before the court Defendant's Application for Rule 37 Relief which was filed December 8, 1987. I have deferred ruling on that matter assuming that you would, of course, comply with the court's orders which have previously been entered on September 28, 1987 and December 23, 1987.
>
> I also note that you have filed nothing in response to defendant's application for Rule 37 relief nor have you responded to their request that the court proceed on their Rule 37 application which was filed February 3, 1988. Unless you respond to those orders immediately, I will have no choice but to rule on their application.

With some justification, feeling that the court was not timely responding to its request for Rule 37 relief, the defendants filed, on April 17, 1989, their second application for Rule 37 relief which is now before the court. On June 9, 1989, plaintiff filed her brief in response to defendant's second application for Rule 37 relief and on June 20, 1989, plaintiff [sic]

filed a reply brief, with exhibits [sic] consisting of letters and other pleadings which plaintiff had filed in connection with the original request for production of documents and subsequent proceedings in relation thereto. In the conclusion of her brief she states: "Finally, the plaintiff renews the offer made in January, 1988 to provide the court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of this [sic] discovery order [sic]."

The purported offer of January, 1988 came long after the court's order of September 28, 1987. The "offer of January, 1988" at best is an "offer of compromise" and extends only to notes made by the plaintiff of her termination interview of July 1, 1983. We also note that even that extremely limited portion of the material in question has still not been produced to the court.

In addition to what we consider to be the salient material which has been referred to in our initial statement in this order, there have been voluminous post-order suggestions, motions for extensions of time, letters and other materials relating not only to the specific matter at issue here, but peripheral matters such as work product. We have carefully examined all of that material. It is impossible to come to any conclusion other than that the plaintiff has steadfastly and deliberately failed and refused to comply with this court's orders of September 28, 1987, and December 23, 1987. Because of the fact that plaintiff is an attorney and is appearing pro se we have, perhaps, ignored what, under other circumstances, would have been cause for immediate and stringent sanctions.

In hindsight the court should probably have imposed sanctions on the plaintiff

following her letter of October 26, 1987, when she stated: "I will not be submitting what you refer to on Page 2 of your order of September 28, 1987 regarding the defendants' motion to compel production of documents as 'any claimed attorney client privilege material' to you for in camera examination." But, at that time we felt that it was better to hold a sanction in abeyance to see if the matter could not be otherwise resolved.

Plaintiff finds fault with the court's order to produce certain material for in camera inspection by the court in order to determine her questions of privilege. As stated in Halkin v. Helms, 598 F2d 1 (D.C. Cir. 1978) it is settled that in camera proceedings are an appropriate means to resolve disputed issues of privilege (cases cited) albeit one to be invoked cautiously (cases cited). With respect to Request 8 the court, rather than order an

in camera examination, only required the plaintiff to "submit within ten (10) days of this order to the court and to the defendants a list of the items which are called for under this Request, identifying them in sufficient detail with sufficient information so that the court may rule on her work product objection."

It may be that the court's orders of September 28 and December 23, 1987, were in error as contended by plaintiff, but, if this court is to maintain any control over the litigation and have it proceed in an orderly fashion to a final conclusion, its orders must be obeyed until reversed. In Patterson v. Coca-Cola Bottling Co., 852 F.2d 280 (7th Cir. 1988) in affirming a dismissal sanction, the court said at Page 283:

> This court has recognized, however, that a district court's discretion in this area is 'broad.' Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 472 (7th Cir. 1984). The sanction of dismissal is 'essential

> to the district courts' ability to manage effectively their heavy caseloads and thus protect the interests of all litigants.' Roland, 811 F.2d at 1177-78. The choice of an appropriate discovery sanction is primarly the responsibility of the district court and its decision will not be reversed absent a clear abuse of discretion. Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981) (noting that the district court had the best opportunity to assess the record for the desired discovery and the degree of compliance, since it had dealt with the parties and issues involved in the lawsuit for several years).

In considering defendants' second application for relief and determining whether sanctions should be applied, we have considered not only this specific matter but the entire procedural history of this case. Each step of the discovery process has been a monumental exercise in briefs, motions and extensions of time. It is difficult to examine the entire record in this case without coming to the conclusion that plaintiff has willfully and deliberately taken the stand that she

will ignore and refuse to obey the orders of the court.

Plaintiff cites in support of her failure to obey the court's order the case of Societe Internationale v. Rogers, 357 U.S. 197 at 212, 78 S.Ct. 1087 at 1096. As defendant notes in its reply brief, the plaintiff's position in this case is certainly not parallel to that of the petitioner in the Rogers case. The basic holding of Rogers is that Rule 37 "should not be construed to authorize dismissal of complaint because of petitioner's non-compliance with a pretrial production order when it had been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." (Emphasis added). As suggested in National Hockey League v. Metropolitan Hockey Club, Inc., 429 U.S. 874, 97 S.Ct. 197 we have considered the full record in this case in making a de-

termination as to whether or not to impose sanctions and what sanctions to impose.

Based on the record and more particularly the record as it pertains to this Rule 37, we find that defendant is entitled to relief under Rule 37 and move on to determine what sanction to impose. Several sanctions are specifically authorized by Rule 37(b)(2) including but not limited tc an order that the matters regarding which the original order was made shall be taken to be established for the purposes of the action, an order refusing to allow the disobedient party to support or oppose designated claims or defenses, an order striking out pleadings or parts thereof, an order staying further proceedings, or dismissing the action or proceeding or any parts thereof. We have considered all of these sanctions and other lesser sanctions such as fines, expenses or contempt.

Obviously, this is not the type of a situation where anything could be ordered admitted nor would staying the proceedings accomplish anything other than to require the defendant to continue to incur further expense when it is obvious that the plaintiff has not and will not and will not comply with the court's order. The only sanction that would be meaningful in view of the entire history of this case is the extreme sanction of dismissal. In arriving at this conclusion we note that as stated before, defendant's second application for Rule 37 relief was filed on April 17, 1989. It is now some two and a half months since that date and plaintiff still has failed to comply with the court's orders and is content to make a compromise offer to the court to provide certain notes for an in camera examination. IT IS THEREFORE ORDERED that this cause of action be and the same is hereby

dismissed with prejudice at plaintiff's costs.

DATED: This 7th day of July, 1989.

/s/ W L Beatty
WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 8, 1988

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

No. 88-1621

JOAN GODLOVE,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
vs.	)	
	)	
BAMBERGER, FOREMAN, OSWALD AND HAHN, a General Partnership, et al.,	)	No. 85 C 192
	)	WILLIAM L. BEATTY Judge
Defendants-Appellees.	)	

This matter comes before the court for its consideration of the following documents:

1. "APPELLANT'S MEMORANDUM REGARDING JURISDICTION" filed herein on April 20, 1988.

2. "DEFENDANTS-APPELLEES' MEMORANDUM IN SUPPORT OF DISMISSAL OF APPEAL FOR LACK OF JURISDICTION" filed herein on April 21, 1988.

3. "LETTER FROM APPELLANT JOAN GODLOVE" filed herein on June 3, 1988.

In general, discovery orders are not appealable. Powers v. CTA, 846 F.2d 1139 (7th Cir. 1988). Further, discovery materials within the category of attorney work-product are not exempt from this rule. See American Express Warehousing, Ltd. v. TransAmerica Insurance Co., 380 F.2d 277, 280-83 (7th Cir. 1967). Thus, the discovery orders in question are not immediately appealable.

Further, mandamus is not a viable route for overturning discovery orders. Powers, 846 F.2d at 1142. Accordingly,

IT IS ORDERED that this case is DISMISSED for lack of jurisdiction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 27, 1988

By the Court:

No. 88-1785

JOAN GODLOVE,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
	)	
vs.	)	
	)	
BAMBERGER, FOREMAN, OSWALD AND HAHN, A General Partnership, et al.,	)	
	)	No. 85-C-192
	)	Hon. William L. Beatty, Judge.
Defendants-Appellees.	)	

O R D E R

A preliminary review of the short record indicates that the order appealed from may not be appealable. On February 16, 1988, the district court denied a motion filed pro se by plaintiff-appellant and entitled "PLAINTIFF'S REQUEST THAT

JUDGES OF SOUTHERN DISTRICT OF INDIANA ENTER ORDERS SETTING FORTH THE STATUTORY GROUNDS AND FACTUAL BASIS FOR THEIR DISQUALIFICATION AND REASONS FOR ASSIGNMENT OF THIS CASE TO A DISTRICT COURT WHICH DID NOT HAVE READY ACCESS TO INDIANA LAW." This order is not a final judgment and does not appear to satisfy the requisites of either the collateral order doctrine or any other rule which confers appellate jurisdiction. Accordingly,

IT IS ORDERED that plaintiff-appellant shall file, on or before May 11, 1988, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 16, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

No. 88-1785

JOAN GODLOVE,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	United States
	)	District Court
	)	for the Southern
vs.	)	District of
	)	Indiana
BAMBERGER, FOREMAN, OSWALD AND HAHN, a General Partnership, et al.,	)	Evansville Division
	)	No. 85 C 192
	)	Judge William L.
Defendants-Appellees.	)	Beatty

This matter comes before the court for its consideration of the following documents:

1. "APPELLANT'S MEMORANDUM REGARDING JURISDICTION" filed herein on May 11, 1989 [sic], by pro se appellant.

2. "APPELLANT'S SUPPLEMENTAL MEMORANDUM REGARDING JURISDICTION" filed herein on December 20, 1988, by pro se appellant.

On consideration thereof,

IT IS ORDERED that this appeal is hereby DISMISSED for lack of jurisdiction. See Hampton v. City of Chicago, 643 F.2d 478 (7th Cir. 1981).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 20, 1990

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon.
Hon.

No. 89-2722

JOAN GODLOVE,	)	
	)	Appeal from the
Plaintiff -	)	United States
Appellant	)	District Court
	)	for the Southern
v.	)	District of Ind-
	)	iana, Evansville
BAMBERGER, FOREMAN,	)	Division.
OSWALD & HAHN, a	)	
general partnership,	)	No. 85 C 192
et al.,	)	
	)	Judge William L.
Defendants-	)	Beatty
Appellees.	)	

This matter comes before the court for its consideration of the "MOTION TO ENLARGE TIME FOR FILING APPELLANT'S PETITION FOR REHEARING" filed herein on June 18,

1990, by counsel for the appellant. On consideration thereof,

IT IS ORDERED that said motion is GRANTED and the petition for rehearing of the appellant will be due by July 5, 1990.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 9, 1990

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

No. 89-2722

JOAN GODLOVE,	)	Appeal from the
	)	United States
Plaintiff -	)	District Court
Appellant,	)	for the Southern
	)	District of Indi-
vs.	)	iana, Evansville
	)	Division.
BAMBERGER, FOREMAN,	)	
OSWALD and HAHN, a	)	No. 85-C-192
general partnership,	)	William L. Beatty
et al.,	)	Judge.[1]
	)	
Defendants-	)	
Appellees.	)	

O R D E R

Plaintiff-appellant Joan Godlove, a lawyer but appearing pro se in these in-

[1] The Honorable William L. Beatty, United States District Judge for the Southern District of Illinois, was assigned to this case after every judge in the Southern District of Indiana recused himself or herself.

stances,[2] on July 5, 1990 filed a Motion for Leave to File Affidavits in Support of Petition for Rehearing, these affidavits admittedly containing facts not in the record, and thereafter on July 12, 1990 plaintiff-appellant also filed a corrected Petition for Rehearing. On consideration of said motion and petition all of the judges on the original panel having voted to deny same,

IT IS HEREBY ORDERED that the aforesaid Motion for Leave to File Affidavits in Support of Petition for Rehearing and the corrected Petition for Rehearing be, and the same are hereby, DENIED.

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[2] In the district court plaintiff-appellant appeared pro se, but at oral argument in this court plaintiff-appelant was represented by Attorney Robert S. Abdalian of New Orleans, Louisiana. Mr. Abdalian advised this court by letter dated July 10, 1990 that although he was counsel of record in this cause he was not previously aware of and had no role in plaintiff-appellant's subsequent pro se filings in this court.

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
501 BELLE STREET
ALTON, ILLINOIS 62002

WILLIAM L. BEATTY
JUDGE

October 4, 1985

Ms. Joan Godlove
Attorney at Law
5150 South Yale
Apt. 23G
Tulsa, Okla. 74135

Mr. D. Reed Scism
Attorney at Law
1 Indiana Square
Suite 2020
Indianapolis, Ind.
46204

Re: Godlove vs. Bamberger, et al.
No. 85 192C

Dear Ms. Godlove and Mr. Scism:

As you probably know by now this case has been assigned to me for further proceedings. I have talked to the clerk's office in Evansville and they were kind enough to forward me the docket sheet. The court file will be transmitted within the next few days. As soon as I have had an opportunity to review the file, I will call both of you to have preliminary discus-

sions about setting up some procedures to handle the pre-trial matters in this case that will hopefully be convenient to all of us. I would hope that it will not be necessary for us to gather in Evansville until the time of the trial and that motions or other arguments can be taken care of either by briefs or by telephone conferences.

Yours truly,

/s/ W L Beatty

William L. Beatty

WLB/mmn

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JOAN GODLOVE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. EV 85-192-C
	)	
BAMBERGER, FOREMAN, OSWALD & HAHN, a partnership, et al.,	)	
	)	
Defendants.	)	

ORDER

On January 14, 1988 plaintiff filed herein a pleading entitled "Plaintiff's Request that Judges of Southern District of Indiana Enter Orders Setting Forth the Statutory Grounds and Factual Basis for Their Disqualification and Reasons for Assignment of This Case to a District Court Which Did Not Have Ready Access to Indiana Law."

We first note that there does not appear to be any authority for filing of such a request. We also note that al-

though this court does not have the Indiana Reports readily available in the court where we sit, all counsel have been very cooperative in furnishing the court copies of Indiana cases upon which they rely. We also note that this court is approximately thirty minutes from the City of St. Louis where, if needed, we would have access to the law libraries of St. Louis University Law School, Washington University Law School and the City of St. Louis Law Library, all of which have complete state reports for all states.

The judges of the United States District for the Southern District of Indiana have recused themselves. We think it would be highly inappropriate for this court to question their reasons for their recusal and we therefore deny plaintiff's request.

DATED: This 16th day of Feb, 1988.

/s/ W L Beatty
WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 12, 1989

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. _____

Hon. _____

No. 88-1785

JOAN GODLOVE, Plaintiff-Appellant, vs. BAMBERGER, FOREMAN, OSWALD AND HAHN, A General Partnership, et al., Defendants-Appellees.	)	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division. No. 85 C 192 Judge William L. Beatty

This matter comes before the court for its consideration of the "APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING" filed herein on May 30, 1989.

On consideration thereof,

IT IS ORDERED that said motion is GRANTED and the petition for rehearing of the appellant will be due by June 20, 1989.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 9, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

No. 88-1785

JOAN GODLOVE,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
	)	
v.	)	
	)	
BAMBERGER, FOREMAN, OSWALD AND HAHN, A General Partnership, et al.,	)	
	)	No. 85 C 192
	)	
Defendants-Appellees.	)	William L. Beatty Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiff-appellant on July 10, 1989, no

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing in banc be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JOAN GODLOVE, Plaintiff,	)	
vs.	)	No. EV 85-192-C
BAMBERGER, FOREMAN, OSWALD AND HAHN, a general partnership, et al., Defendants.	)	

PLAINTIFF'S BRIEF IN ANSWER TO DEFENDANTS' SECOND APPLICATION FOR RULE 37 RELIEF FOR FAILURE TO PRODUCE DOCUMENTS

This matter is before the Court on Defendants' Second Application for Rule 37 Relief for Failure to Produce Documents [hereafter referred to as "Defendants' Rule 37 Motion" or "the pending motion"].

I. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

Documents designated in the following manner in Defendants' First Request for

Production of Documents are the subject of the pending motion:

> Any lawyer's daybooks, diaries or calendars provided to Plaintiff by the Bamberger, Foreman, Oswald and Hahn (the "Bamberger Firm") or used by Plaintiff during her employment by the Bamberger Firm. [Request No. 2]
>
> All records, memoranda, notations, statements, summaries and all other documents relating to the matters in controversy which Plaintiff obtained from or as a result of interviewing any person purporting to have knowledge of the matters in controversy. [Request No. 8].
>
> Any notes or summaries of any kind made by Plaintiff at any time regarding meetings, conversations or communications of any kind to, from or with any Defendant. [Request No. 9]
>
> Any notes, summaries, comments or writings of any kind prepared at any time by Plaintiff regarding events or experiences, occurring during her tenure with the Bamberger Firm or any events or experiences in any way connected with or related to the Bamberger Firm. [Request No. 10]

(Emphasis supplied).

Requests No. 8, 9 and 10 were objected to by the plaintiff on her own behalf on

the ground, among others, that the documents sought contained information encompassed by the work-product doctrine. Production of the documents sought by Requests No. 2 and 9 was objected to by the plaintiff on behalf of clients of the Bamberger firm on that and other grounds, including the attorney-client privilege, the statutory duty imposed on the plaintiff by Indiana Code § 34-1-15-4 [sic] "[t]o maintain inviolate the confidence, and, at every peril to [her]self, to preserve the secrets of [her] client[s]," and the parallel provision of Disciplinary Rule 4-101(B), which prohibited her from revealing "confidences" or "secrets" of her former clients, including those contained in the requested daybooks, to third parties, such as defendants' counsel, without the express consent of the clients in question. See Plaintiff's Response to Defendants' First Request for Production

of Documents, para. 3 at pp. 2-3. The plaintiff did, however, offer to produce relevant entries contained in the daybooks if the defendants demonstrated that she was no longer bound, under the applicable disciplinary rule, to treat those entries as "confidential":

> Subject to the foregoing objections and defendants' establishing that the information sought is relevant to the subject matter of this action or reasonably calculated to lead to discovery of admissible evidence and in light of the provisions of Disciplinary Rule 4-101(C)(4), which permit the plaintiff to reveal client confidences or secrets necessary to defend herself against an accusation of wrongful conduct, the plaintiff states that she will furnish defendants' counsel copies of pages from the daybooks in question which contain information about particular cases (with the names of other clients and information related to their respective cases redacted) upon (1) the Bamberger firm's supplementing its answer to Interrogatory No. 11 of Plaintiff's First Set of Interrogatories to Defendant Bamberger, Foreman, Oswald and Hahn to include specific allegations of negligence or wrongful conduct made by clients of the plaintiff and the Bamberger firm (as distinguished from representatives of companies which compensated the Bamberger firm

> for services rendered such clients); the legal matter to which those allegations related; the date on which each such allegation was made; and when, if ever, the plaintiff was informed of such allegation and (2) the plaintiff's being furnished with sworn statements of the clients in question setting forth the specific allegation(s) made by the client; the legal matter to which those allegations related; the date on which each such allegation was made; whether the allegation was made orally or in writing (in the event the allegation was in writing, a copy of the same should be attached to the client's sworn statement); and to whom the allegation was communicated at the Bamberger firm.

See Plaintiff's Response to Defendants' First Request for Production of Documents, para. 4, at 3-4 (emphasis in original).

Rather than requesting the Court to conduct an in camera review of the documents claimed to be immune from discovery under the work-product doctrine and/or the attorney-client privilege, defendants filed a motion to compel production of those documents. Rather than claiming that they were "necessary" to the prepa-

ration of their defense or that they would be "prejudiced" if production was not compelled, defendants simply argued in conclusory language that Requests No. 2, 8, 9 and 10 were "all proper requests for documents which Defendants are entitled to inspect and copy pursuant to Rule 34, FRCP." See Motion to Compel Production of Documents at 1.

In opposing that motion, the plaintiff noted that there had been no showing that the information sought by Request No. 2 was relevant to specific issues in the pending litigation and cited cases holding that a party moving to compel disclosure of documents must make a clear showing that they are relevant to issues involved in the litigation. See Plaintiff's Brief in Response to Defendants' Motion to Compel Production of Documents at 4-6. She also advanced the following arguments

in an effort to persuade the Court not to compel production of the daybooks:

> Because the specific time of day that particular services were rendered by the plaintiff has not been put in issue and because the information contained in the requested documents is already in the defendants' possession in the form of billing statements, defendants cannot establish that inspection of those documents is in some way necessary for their adequate trial preparation. Therefore, production of those documents is unwarranted. See, e.g., Pioneer Hi-Bred Internat'l Inc. v. Holden's Found. Seeds, Inc., supra, 105 F.R.D. at 82; see also Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) (in employment discrimination action, there was no abuse of discretion in denying plaintiff's discovery of employers computer tapes, where all information contained on the tapes was included in wage cards which plaintiffs discovered, even though using the cards might be more time consuming, difficult and expensive). Contrary to what defendants might like to believe, Rule 34 does not givem [sic] them carte blanche to search through a mass of documents in the plaintiff's possession for the purpose of ascertaining what those documents are and what they contain. See, e.g. United States v. Becton, Dickinson & Co., 30 F.R.D. 132, 134 (D.N.J. 1962). Nor does that rule give them a permit to explore those documents in the hope that they may find something which

may adversely effect the plaintiff's case or that may prove helpful to their case. Id.

Defendants and their attorney should know that the work product doctrine may be asserted by either the client or the attorney. See, e.g., In re Grand Jury, 106 F.R.D. 255 (D.N.H. 1985). They should also be aware of the fact that that doctrine is applicable to closed cases as well as pending cases. See La Rocca v. State Farm Mut. Auto. Ins. Co., 47 F.R.D. 278 (D. Pa. 1969). Finally, they should not need to be told that an attorney may be held to have waived the work-product immunity from discovery by voluntarily producing certain documents which would otherwise be protected under the work-product doctrine. See, e.g., Hercules, Inc. v. Exxon Corp., 434 F.Supp. 136 (D. Del. 1977).

Notwithstanding defendants' arguments to the contrary, the plaintiff has an ethical duty to protect the information contained in the requested documents which comes within the purview of the attorney-client privilege or the work product doctrine. Disclosure of that information to defendants' counsel would constitute a violation of that duty and could conceivably subject her to disciplinary action or a suit by a former client.

Plaintiff's Brief in Response to Defendants' Motion to Compel Production of

Documents at 11-12 (emphasis in original).

This Court's attention was also directed to the fact that defendants had failed to make the showing required by Rule 26(b)(3) to warrant its ordering production of the documents objected to on work-product grounds. See Plaintiff's Brief in Response to Defendants' Motion to Compel Production of Documents, at 13-15.

On September 28, 1987, the Court entered an order which provided, in pertinent part:

> With respect to Request No. 2 which calls for daybooks, diaries or calendars provided to the plaintiff by the defendants during her employment, she objects that as to the calendar it is not in her possession but fails to identify the person who has possession of it and as to the other items contends that they are not relevant and contain information that is either privileged or work product. Defendants' brief persuasively disposes of these objections. If, in fact, the diaries do contain matters communicated to the plaintiff by a client, she may submit that material for an In Camera examination. Her objection on the ground that the material is work product is as defendants say, spe-

cious. The objection is therefore overruled with the exception that any claimed attorney client privileged material may be submitted for In Camera examination.

. . .

Request No. 8 calls for records, memoranda, notations, statements, etc. relating to the matters in controversy which plaintiff obtained from or as a result of interviewing any person purporting to have knowledge of the matters in controversy. Since the plaintiff has not identified the material which might be responsive to this request, it is impossible for the court to rule on her blanket objection. We therefore order the plaintiff to submit within ten (10) days of this order to the court and to defendants a list of the items which are called for under this request, identifying them in detail with sufficient information so that the court may rule on her work product objection.

Request No. 9 calls for notes or summaries made by the plaintiff regarding meetings, conversations or communications from or with any defendant. Defendants [sic] objection is overruled. As defendants note in their brief there is no explanation as to why these would not be in plaintiff's custody or control or no suggestion as to who has custody or control of them. These documents would have been made of necessity at some period of time prior to the time litigation was contemplated.

> Request No. 10 calls for notes, summaries, comments or writings regarding events or experiences during her tenure with the Bamberger Firm and for any written observations or impressions regarding the defendant firm. The same reasoning applies to this request as to Request No. 9 and the objection is therefore overruled.

Order (Sept. 28, 1987) (emphasis supplied).

The plaintiff responded to the Court's order of September 28, 1987 in the following manner:

> Having done what I felt was required of me by the Code of Professional Responsibility (see Plaintiff's Brief in Response to Defendants' Motion to Compel Production of Documents, at p. 2; Plaintiff's Response to Defendants' First Request for Production of Documents, at pp. 2-4), and inasmuch as the attorney-client privilege belongs to the client alone, while the work product doctrine may be asserted by either the client or the attorney (see, e.g., In re Grand Jury, 106 F.R.D. 255 (D.N.J. 1985), I will not be submitting what you refer to on page 2 of your order of September 28, 1987 regarding the defendants Motion to Compel Production of Documents as "any claimed attorney client privilege material" to you for In Camera examination. This does not mean, however, that I have aban-

> doned my position (1) that the entries contained in the daybooks fall within the work product doctrine inasmuch as they reflect mental impressions, conlusions, opinions and legal theories (as well as communications between attorney and client) and (2) that disclosure of those entries to third parties, such as defendants' counsel, would result in waiver of the protection afforded by that doctrine.
>
> With regard to Defendants' Request No. 8, which called for production of "[a]ll records, memoranda, notations, statements, summaries and all other documents relating to the matters in controversy which plaintiff obtained from or as a result of interviewing any person purporting to have knowledge of the matters in controversy," please be advised that the only documents which are in my possession which fit within this category are notes that I made in anticipation of litigation.

Letter from Joan Godlove to Hon. William L. Beatty (Oct. 26, 1987) (emphasis supplied).

On November 4, 1987, Plaintiff's Request that Bamberger Firm Notify Clients of Pendency of Action and Assertion of Attorney-Client Privilege and Work-Pro-

duct Doctrine on Their Behalf was filed. Seven days later, defendants advanced four reasons for denying the plaintiff's request:

> First, Plaintiff's request is not authorized by the Federal Rules of Civil Procedure. Second, the Court has already ruled on Plaintiff's objections to requests 2 and 9 of Defendants' request for production. In its September 28, 1987, order it overruled Plaintiff's anticipation of litigation and privilege objections to request 2 with the proviso that any claimed privileged material could be submitted for in camera inspection by the Court and it overruled without qualification Plaintiff's objections to request 9, including her anticipation of litigation and privilege objections. That ruling disposes of those issues for this case.
>
> Third, Plaintiff cites no authority for her claim that disclosure of documents to the Bamberger Firm would waive protection afforded by the attorney-client privilege or the anticipation of litigation exception, and Defendants certainly do not agree with her unusual position. She made essentially the same argument in her objections, which were overruled.
>
> Fourth, the Bamberger Firm's obligations to its clients, whatever they may be, are its responsibility, not Plaintiff's. Plaintiff has no

> standing as an ombudsman or guardian to represent the Bamberger Firm's clients.

Bamberger Firm's Response to Plaintiff's Request that Bamberger Firm Notify Clients of Pendency of Action and Assertion of Attorney-Client Privilege and Work-Product Doctrine on Their Behalf, at pp. 1-2.

On November 23, 1987, the plaintiff's supplemental responses to Requests No. 9 and 10 were served on the defendants:

> The remainder of the documents described in paragraph 9 of Defendants' Rule 34 Request as "[a]ny notes or summaries of any kind made by Plaintiff at any time regarding meetings, conversations or communications of any kind to, from or with any Defendant" are (a) already in the defendants' possession, custody and control, (b) encompass documents described in paragraph 2 of Defendants' Rule 34 Request, (c) encompass documents which constitute attorney-client communications, or (d) encompass documents which were prepared in anticipation of litigation or for trial and, therefore, are not within the scope of discovery permitted by Rule 26(b)(3) and Rule 34 (a) without a showing that the defendants "[have] substantial need of the materials in the preparation of [their] case and that [they are] unable without undue hardship to

obtain the substantial equivalent of the materials by other means."

5. Documents described in paragraph 10 of Defendants' Rule 34 Request as "[a]ny notes, summaries, comments or writings of any kind prepared at any time by Plaintiff regarding events or experiences, occurring during her tenure with the Bamberger Firm or her observations or impressions regarding the Bamberger Firm or any events or experiences in any way connected with or related to the Bamberger Firm" either constitute attorney-client communications or documents prepared in anticipation of litigation or for trial.

Plaintiff's Post-Ruling Response to Defendants' First Request for Production of Documents, para. 4, 5 at 19.

On December 8, 1987 Defendants' Application for Rule 37 Relief was filed. Because the issues raised by this application related to the plaintiff's response to Request No. 8, as well as matters addressed in the Court's order of September 28, 1988 and because the plaintiff had not received notice of the District Court's ruling, if any, on the ade-

quacy of the information provided in her letter of October 26, 1987 regarding the documents sought by Request No. 8, she filed a motion to extend the time for filing her response to defendants' application for Rule 37 relief to and including a date which was eighteen days after notice of the Court's ruling on that issue. See Plaintiff's Motion for Extension of Time to File Brief in Response to Defendants' Application for Rule 37 Relief (served Dec. 22, 1987; filed Dec. 28, 1987) at 1-2.

On December 23, 1987, this Court entered the following order which provided, in pertinent part:

> On November 4, 1987 the plaintiff filed herein her "Plaintiff's Request that Bamberger Firm Notify Clients of Pendency of Action and Assertion of Attorney-Client Privilege and Work Product Doctrine on Their Behalf." This pleading if it be a pleading, was filed in apparent response to the court's ruling of September 28, 1987 regarding Request No. 2 and 9 by the defendant. She had previously objected to these

requests for production and those objections were disposed of by the court's order of September 28, 1987.

On November 12, 1987 defendant filed a response to plaintiff's pleading noting that there is no provision for this type of pleading in the Federal Rules of Civil Procedure. In any event, we do not think that defendant is under any obligation to comply with this request and to the extent that it is addressed to the court it is denied and to the extent that it is addressed to the defendant, the court finds that there is no necessity for them to comply with the request.

On the same subject, on December 8, 1987, the defendant filed a motion for relief pursuant to Rule 37 accompanied by his brief. We have carefully examined that motion and brief and have reviewed our order of September 28, 1987 relating to the same matters. It is difficult for the court to believe that plaintiff would deliberately ignore the court's order and we will operate on the assumption that her refusal to comply is the result of some type of misunderstanding. To obviate that situation the plaintiff is hereby specifically ordered to produce the documents and the material encompassed by Request No. 2 either to the defendant or to the court for an In Camera examination within ten (10) days of the date of this order. The plaintiff is ordered to produce to the defendant within ten (10) days of the date of this order a list of the items called for under

> Request No. 8 identifying them in detail with sufficient information so that the court may rule on her work product objection. Plaintiff is ordered to produce to the defendant for their inspection and examination, all material encompassed by defendants' Request No. 9. The plaintiff is required to produce to the defendants for their inspection and examination all material called for under Request No. 10.

Order (Dec. 23, 1987) at 1-2.

The following day, the Court entered an order directing that the plaintiff's deposition be taken before Magistrate Kennard Foster in Indianapolis on January 21, 1988. Order (Dec. 24, 1987).

On January 14, 1988, the Court denied plaintiff's motion for an extension of time to respond to defendants' application for Rule 37 relief and in doing so, wrote:

> It is apparent from plaintiff's motion that she considers the second paragraph of her letter of October 26, 1987 as a response to the court's order of September 28, 1987. We do not view it as such. In that order we said: "We therefore order the plaintiff to submit within ten (10) days of this order to the court and to the defendants, a list of the items which were called for under

> this request (referring to Request No. 8) identifying them in detail with sufficient information so the court may rule on her work product objection."
>
> In her letter she states "Please be advised that the only documents which are in my possession which fit within this category are notes that I made in anticipation of litigation." The court contemplated that she would respond by formal pleading giving the dates when the documents or notes were made, generally what each document concerned and in some detail why she contended that each document was in anticipation of litigation.
>
> At such time as plaintiff sees fit to comply with the order of September 28, 1987 and submit a formal detailed response to that order, we will proceed with a ruling. In the meantime, nothing will be served by extending plaintiff's time to file a brief. Her motion is therefore denied.

Order (Jan. 14, 1988).

On January 26, 1988, the plaintiff, in effect, renewed her request that the District Court reconsider its earlier orders regarding defendants' motion to compel production of the documents sought by Requests No. 2, 8, 9 and 10 and asked for an

extension of time to file a brief addressing the work-product issue raised during her deposition, as well as in the discovery orders in question, to and including a date which was eighteen days after a copy of that portion of her deposition where she asserted the "work-product" doctrine in response to certain questions asked by defendants' counsel and the magistrate ruled on how that issue should be addressed was made part of the record in this case. The grounds for the plaintiff's motion were as follows:

> 1. During the plaintiff's deposition on January 22, 1988, the plaintiff asserted that certain information sought through questions asked by defendants' counsel was protected by the "work-product" doctrine embodied in the United States Supreme Court's decision in Hickman v. Taylor and Rule 26(b)(3) of the Federal Rules of Civil Procedure.
>
> 2. At the request of defendants' counsel, Magistrate Foster considered the questions asked by defendants' counsel, the plaintiff's objections to those questions, and the grounds for those objections. The magistrate then ruled on how the

issue raised by defendants' counsel's questions should be addressed.

3. It is essential that the questions asked, the objections made, and the magistrate's ruling be made a part of the record in this case before the plaintiff addresses the "work-product" issue raised by what was, in essence, an oral motion to compel the plaintiff to respond to certain deposition questions.

4. The issue raised by defendants' oral motion to compel the plaintiff to respond to certain deposition questions is also raised by that part of the Court's order of January 14, 1988 which refers to the order of September 28, 1987 and indicates that the Court will not rule on the plaintiff's objections to the production of certain documents on "work-product" grounds until the plaintiff submits a formal detailed response giving the dates when the documents or notes objected to were made, generally what each document concerned, and in some detail why the plaintiff contended that each document was prepared in anticipation of litigation.

5. Permitting the plaintiff (or her attorneys) to address the "work-product" issue raised during her deposition and in the Court's orders of September 28, 1987 and January 14, 1988 in a single brief would not only promote judicial economy, but also be in furtherance of convenience to the parties.

Motion for Extension of Time to Address "Work-Product" Issue Raised during Plaintiff's Deposition and in the Court's Orders of September 28, 1987 and January 14, 1988, at 1-2.

On February 3, 1988, defendants responded to the plaintiff's motion in the following manner:

> At her deposition, Plaintiff made a "work product" response to Defendants' question as to the dates on which she prepared notes regarding her discharge interview on July 1, 1983.
>
> She now seeks an indefinite extension of time to address this issue.
>
> In its order of September 28, 1987, the Court overruled this objection (and others) to Defendants' request that Plaintiff produce "any notes or summaries of any kind made by Plaintiff at any time regarding meetings, conversations or communications of any kind to, from or with any Defendant."
>
> All other objections made by Plaintiff at the deposition were ruled on by Magistrate Foster at the time.
>
> Consequently, the Court's ruling of September 28, 1987, as reaffirmed

> by the Court's orders of December 23, 1987, and January 14, 1988, stands and there is no question before the Court on "work product."

Defendants' Response to Plaintiff's Motion for Extension of Time to Address "Work Product" Issue, at 1-2.

Before denying the plaintiff's motion for extension of time to address the work-product issue, the Court made the following findings:

> As plaintiff notes in her motion the court has previously ruled on the work product objection that plaintiff raised. At this point there is nothing before the court on that question.
>
> Defendant notes in his response that objections made at the time of the taking of the deposition were ruled on by the magistrate who was supervising the deposition. The motion is therefore denied.

Order (Feb. 25, 1988).

That portion of the transcript of the deposition referred to in the plaintiff's motion for extension of time was made a part of the record in this case following

the entry of the Court's order of February 25, 1988. It reveals, among other things, that the plaintiff had offered not once but twice to submit the documents claimed to be immune from discovery under the work-product doctrine for in camera review and that the magistrate had ruled that the work-product issue "should be briefed by both sides" before being decided. See Partial Transcript of Deposition Upon Oral Examination of Joan Godlove Taken on January 22, 1988 Before Magistrate Kennard Foster, at pp. 309:1 - 322:7.

The defendants did not, within the time provided by Rule 72(a) of the Federal Rules of Civil Procedure, file written objections to the magistrate's oral ruling regarding the manner in which the work-product issue raised during plaintiff's deposition should be addressed. Nor did they ask the District Court to reconsider that ruling or demonstrate that it was

"clearly erroneous" or "contrary to law."

On March 28, 1988, the plaintiff sought appellate review of the Court's order of February 25, 1988. See Notice of Appeal (Mar. 28, 1988). Two days later, she asked this Court to reconsider its December 23, 1987 order and direct the Bamberger firm to notify its clients of the pendency of the appeal. See Motion to Reconsider and Vacate Order of December 23, 1987 Denying Plaintiff's Request that Bamberger Firm Notify Clients of Pendency of Action and Assertion of Attorney-Client Privilege and Work-Product Doctrine on Their Behalf and Enter Order Requiring Bamberger Firm to Notify Its Clients of Pendency of Appeal (Mar. 30, 1988).

On May 10, 1988, the plaintiff provided the Court with additional authority for modifying its earlier discovery orders:

> For Mr. Scism to have argued that the "Plaintiff has cited no author-

ity whatsoever in support of her claim that disclosing documents to an attorney for a party causes a waiver of any attorney client privilege between that party and its client," (emphasis supplied), required him to ignore the dictates of Disciplinary Rule 4-101(B) which prohibits an attorney from revealing "confidences" or "secrets" of his client without the client's consent, as well as the statutory duty imposed on Indiana attorneys by Indiana Code 34-1-15-4 [sic] to maintain inviolate the confidence and at every peril to himself, to preserve the secrets of his clients, both of which have been brought to the attention of this Court and opposing counsel on a number of occasions. See also Rule 1.6 [Confidentiality of Information], Rules of Professional Conduct, which provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing any criminal act; or
>
> (2) to establish a claim

> or defense on behalf of the lawyer in a controversy between the lawyer and the client to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(Emphasis supplied).

The following excerpt from the official comments to Rule 1.6 of the Rules of Professional Conduct regarding "authorized disclosure" should make it clear to Mr. Scism, his clients, and this Court that the disclosure of information protected by the attorney-client privilege to Mr. Scism or any other lawyer associated with the Barnes & Thornburg firm cannot be said to have been "impliedly authorized" by clients of the Bamberger firm who were represented by the plaintiff while she was an associate of that firm:

> Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

(Emphasis supplied).

Moreover, as is apparent from the

> plain language of Rule 1.6, disclosures that are "impliedly authorized" by a client are disclosures which are necessary "to carry out the representation [of the client]," not the representation of the firm in a controversy between the firm and one of its former associates.
>
> From the above it follows that if the plaintiff revealed information relating to her representation of a client of the Bamberger firm to Mr. Scism or any other attorney in the Barnes & Thornburg firm without first having obtained the client's consent after consultation, she would be subject to disciplinary proceedings for violation of the express provisions of Rule 1.6 of the Rules of Professional Conduct.
>
> Because the plaintiff does not have the names and addresses of the clients she represented, there is no way she can contact them to determine whether they would consent to disclosure of what amounts to confidential information. The Bamberger firm, on the other hand, has access to such information in its files. If, indeed, the defendants wish to obtain the information in question, it is incumbent upon them to contact those clients and obtain their written consent, after consultation, to such disclosure.

Brief in Reply to Defendants' Answer to Plaintiff's Motion to Reconsider Order of December 23, 1987 Denying Request that

Bamberger Firm Notify Clients of Pendency of Action and Assertion of Attorney-Client Privilege and Work Product Immunity (May 10, 1988) at pp. 5-7.

At no time in the intervening thirteen months have defendants (or their counsel) addressed the above-cited provisions of the Rules of Professional Conduct. Nor did the Court rule on plaintiff's motion to reconsider before August 8, 1988, the date on which the Seventh Circuit dismissed the appeal on jurisdictional grounds, i.e., that the discovery orders in question were not immediately appealable and that mandamus was not a viable route for overturning discovery orders. See Godlove v. Bamberger, Foreman, Oswald and Hahn, No. 88-1621 (7th Cir. Aug. 8, 1988).

At the pretrial conference conducted on March 31, 1989, the Court elected not to rule on the defendants' request that it

proceed on their application for Rule 37 relief, but indicated that it might consider a Rule 37(b)(2) motion to preclude the plaintiff from introducing any of the requested documents in evidence at trial. Rather than seeking this less drastic remedy, defendants sought the extreme sanction of dismissal with prejudice of the remaining counts of plaintiff's amended complaint.

II. ARGUMENT

Although defendants argue that the circumstances presented in this case are "similar" to those addressed by the United States Supreme Court in National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed 2d 747 (1976), the plaintiff submits that a closer parallel may be found in the Supreme Court's decision in Societe Internationale Pour Participations Industrielles et Com-

merciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958).

In Rogers, a case which it cited with approval in National Hockey League, the Supreme Court noted that Rule 37 "should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. at 212, 78 S.Ct. at 1096. In that case the Supreme Court equated "inability" to comply with the lower court's pretrial production order with the possibility that the petitioner's compliance "might violate Swiss laws":

> [P]etitioner's failure to satisfy fully the requirement of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonpro-

> duction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. . . . Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. . . .
>
> In view of the findings of this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

357 U.S. at 211-12, 78 S.Ct. at 1095-96. Cf. Hastings v. North East Independent School Dist, 615 F.2d 628, 631-32 (5th Cir. 1980) (in action by teacher federation against school board, alleging harassment, trial court abused its discre-

tion in imposing sanctions of dismissal for its refusal to disclose names of its members, who had not authorized release of their names, since to direct disclosure of such members' names would subject them to the very retaliatory measures they sought to avoid).

As the Seventh Circuit has noted on more than one occasion, "a Rule 37(b) dismissal requires both a failure to comply with a discovery order and a showing of willfulness, bad faith, or fault." See Patterson v. Coco-Cola Bottling Co., 852 F.2d 280, 283 (7th Cir. 1988) (emphasis in original); Roland v. Salem Contract Carriers, Inc., 811 F.2d 1175, 1179 (7th Cir. 1987). If this Court follows Rogers, it will find that the plaintiff's failure to comply fully with its production orders was due to "inability" fostered neither by her own conduct nor by circumstances within her control. It will also find that

the "weighty excuse" for the plaintiff's nonproduction is her justifiable concern that disclosure of information relating to her representation of a client of the Bamberger firm to Mr. Scism or any other attorney in the Barnes & Thornburg firm without first having obtained the client's consent, after consultation, would subject her to disciplinary proceedings at the hands of the Indiana Supreme Court for violation of the express provisions of Rule 1.6 of the Indiana Rules of Professional Conduct.

As the Tenth Circuit recently noted, factors which should be considered by district courts in making their findings on the issue of "fault," in support of imposing the sanction of dismissal for a plaintiff's abuse of the discovery process include "'(1) the degree of actual prejudice to the defendant . . .; (2) the amount of interference with the judicial

process . . .; and (3) the culpability of the litigant.'" [Citations omitted]. "'Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on the merits . . . is dismissal an appropriate sanction.'" [Citation omitted]. See Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1465 (10th Cir. 1988).

In the case at bar, defendants have never made any attempt to demonstrate how they could have been prejudiced by plaintiff's failure to produce the requested daybooks nor could they when similar information is already in their possession in the form of the firm's billing records. Nor have they endeavored to show the Court that they were unable to obtain "the substantial equivalent" of any information sought by way of Requests No. 2, 8, 9 or 10 during the course of the plaintiff's deposition. From this it follows that

dismissal of the plaintiff's complaint could not be viewed as an appropriate sanction.

While it is true that the standard of review of an order of dismissal under Rule 37 is abuse of discretion, National Hockey League v. Metropolitan Hockey Club, supra, 427 U.S. at 642, 96 S.Ct. at 2780, findings of fact related to a motion for discovery sanctions are reviewed under a clearly erroneous standard and the district court's selection of the applicable legal standards is reviewable de novo, Fjelstad v. American Honda Mtr. Co., 762 F.2d 1334, 1337 (9th Cir. 1985). Finally, appeal of an order imposing sanctions necessarily includes a review of the underlying discovery order. See e.g., Hastings v. North East Independent School Dist., supra, 615 F.2d at 631; 8 Wright & Miller, Federal Practice & Procedure 2006. Indeed, it has been said that the validity

of the sanction imposed depends upon the viability of the underlying discovery order. See Ager v. Jane C. Stormont Hosp. & Training School for Nurses, 622 F.2d 496, 500 (10th Cir. 1980) (the viability of the civil contempt order entered against Ager's attorney when he refused to comply with a discovery order requiring him to identify non-witness experts with whom he had consulted depends upon the validity of the underlying discovery order).

When this Court considers its order of September 28, 1987 in light of defendants' request that the plaintiff produce documents made or prepared by the plaintiff "at any time," it will realize that its findings of fact regarding plaintiff's response to Requests No. 9 and 10 that "[t]hese documents would have been made of necessity at some period of time prior to the time litigation was contemplated" are

"clearly erroneous." (Emphasis supplied).

Considerations of constitutional due process limit a court's authority to impose any discovery sanction. See generally Societe Internationale v. Rogers, supra, 357 U.S. at 209, 78 S.Ct. at 1094. To comply with the requirements of due process, a court must provide fair notice and an opportunity for a hearing on the record before imposing sanctions. See generally Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). The due process clause places at least two other limitations on a court's power to impose discovery sanctions: "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinea, 456 U.S. 694, 707, 102 S.Ct. 2099,

72 L.Ed.2d 492 (1982).

To date, the plaintiff has not been afforded an opportunity for a hearing on the record on the "work-product issues" raised in December 1987 and January 1988. Moreover, defendants have failed to demonstrate to the Court how the information sought by Requests No. 2, 8, 9 and 10 relate to each of the counts they have asked the Court to dismiss with prejudice. Finally, the plaintiff renews the offer made in January 1988 to provide the Court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of its discovery orders.

Respectfully submitted,

/s/ Joan Godlove
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Plaintiff

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing brief has, this 6th day of June, 1989, been deposited in the United States mail, first class postage prepaid, addressed to D. Reed Scism, Barnes & Thornburg, 1313 Merchants Bank Building, 11 South Meridian Street, Indianapolis, Indiana 46204.

/s/ Joan Godlove
Joan Godlove

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

JOAN GODLOVE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	NO. EV 85-192-C
	)	
BAMBERGER, FOREMAN, OSWALD AND HAHN, a general partnership, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFF'S ANSWER BRIEF ON DEFENDANTS' SECOND APPLICATION FOR RULE 37 RELIEF

Plaintiff's brief in answer to Defendants' second application for Rule 37 relief is largely a reply of arguments made previously. Defendants have already responded to these arguments and the arguments have been rejected by the Court.

Consequently, Defendants see no need or useful purpose to be served by replowing that familiar ground and instead invite the Court's attention to the briefs Defen-

dants have filed previously regarding this matter.

Plaintiff does raise two points, however, that are new.

First, she contends that her position is parallel to that of the petitioner in Societe Internationale Pour Participations Industrielles Et Commerciales, S.A., v. Rogers, Attorney General, Successor to the Alien Property Custodian, et al., 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). It is not parallel at all.

In Rogers the Court held that a well-grounded fear of criminal prosecution was sufficient to establish inability to comply with a discovery order.

In that case the criminal laws involved were Swiss and the Swiss Federal Attorney had deemed that disclosure of the records in accordance with the production order would constitute a violation of the Swiss Penal Code. The petitioner in that case

also had made substantial efforts to produce documents where such production would not violate Swiss law.

Those facts contrast sharply with Plaintiff's facts in this case. Plaintiff justifies her refusal to produce documents as ordered by the Court solely on her "concern" that complying with the Court's order would subject her to disciplinary proceedings in Indiana, where she no longer practices (except for this case). She makes no claim that by compliance with the Court's order she would be subject to criminal prosecution.

To support her "concern" she offers nothing other than her own unique and peculiar understanding of Rule 1.6 of the Indiana Rules of Professional Conduct. Her "concern" is groundless; and to date, Plaintiff has not cited any authority in support of her interpretation of Rule 1.6.

Accepted principles in the law of privilege run directly counter to her position. The attorney-client privilege extends to agents and employees of an attorney. See Am.Jur.2d, Witnesses, §§191, 217. Consequently, Defendants' counsel, as Defendants' agent, would not be a third party for purposes of disclosure.

The commentary of the rule also conflicts with Plaintiff's position. The commentary states: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." (Disciplinary Rule 4.101(B), cited by Plaintiff, has not been in effect in Indiana since January 1, 1987. I.C. 34-1-15-4, also cited by Plaintiff does not exist.)

Finally, in contrast to the Rogers petitioner's good faith as evidenced by its "extensive efforts at compliance" and its

production of records not covered by the Swiss laws, Plaintiff has steadfastly refused to comply with the Court's order as to Requests 2, 8, 9, and 10 or make any effort to do so. Plaintiff, for example, apparently does not contend that in camera production of documents described in Request 2 for which an attorney-client privilege is claimed, as ordered by the Court, or submission of a list of documents described in Request 8 for which work product status is claimed, as ordered by the Court, would waive privilege or work product claims or subject her to disciplinary action yet she has refused to do either for more than a year and a half. Her position has been and is one of open defiance.

The Rogers decision clearly provides no excuse for Plaintiff's conduct.

Second, in her brief on this motion she claims that that [sic] at her deposition

in January, 1988, she made an offer "...to provide the Court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of its discovery orders." [Plaintiff's Brief in Answer, pages 21-22].

This claim is simply false.

At her deposition in a lengthy discussion as to whether Plaintiff could be compelled to state when she made certain notes regarding her termination interview on July 1, 1983, she said, "And if the Court feels better, I will be happy to provide you or Judge Beatty with copies of these notes for your in camera inspection ..." and "... I will be happy to furnish you or Judge Beatty, whichever you choose, copies of those notes." [Plaintiff's Deposition pp. 316, l. 4-7, 318, l. 22-23, 319, l. 1 (Emphasis added); Copies of these pages are attached]. "Those notes" are all she offered to provide. She has,

to Defendants' knowledge never offered to produce any documents other than the notes of her termination interview on July 1, 1983, for in camera inspection by the Court.

To date, her record of defiant refusal to comply is untarnished: she has not produced any of the documents covered by Request No. 2 nor has she submitted any material for which an attorney-client privilege is claimed for in camera examination by the Court as provided by the Court's September 28, 1987, order. She has not submitted the list of items called for by Request No. 8, as directed in the Court's order of September 28, 1987, so that the Court could rule on her work product objection. She has produced none of the items called for by Request No. 9 nor has she produced any of the items called for by Request No. 10.

In sum, Plaintiff has presented no valid justification for her defiance of the Court's orders. Her conduct is clearly willful and in bad faith. Her complaint should be dismissed and Defendants should be granted their expenses for this motion and their previous motions [sic] to compel Plaintiff to produce the documents requested by their first request to produce. The Court has discretion to grant such relielf and a clearer case for it cannot be imagined.

s/ D. Reed Scism
D. Reed Scism

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of "Defendants' Reply to Plaintiff's Answer Brief on Defendants' Second Application for Rule 37 Relief" has been served this 19th day of June, 1989, by placing a copy of same in United States mail, first class postage prepaid, addressed to:

Ms. Joan Godlove
3179 South Madison
Tulsa, Oklahoma 74105-2019

s/ D. Reed Scism
D. Reed Scism

7081z

constitutes a waiver of the work product, the qualified work product doctrine, and, as I said, it was on the basis of that research done. And if the Court feels better, I will be happy to provide you or Judge Beatty with copies of those notes for your in camera inspection, and I would like also to provide you with some legal authority, you know, in the flesh, so to speak, that I've just now referred to if there's some question about it, whether there's legal authority for the suppport of that position.

MAGISTRATE FOSTER: If you've got the notes --

THE WITNESS: I do not.

MAGISTRATE FOSTER: You don't have them here with you at this point?

THE WITNESS: (Negative shake.)

MAGISTRATE FOSTER: And you feel that any disclosure at this point might be a

waiver and therefore that's why you're objecting?

THE WITNESS: I do, that's the

talking about theories, he's not talking about theories, he asked you did you make notes concerning the meeting after which or during which or at the conclusion of which you were discharged; was that the question, sir?

MR. SCISM: That's right, Your Honor, and she has answered that yes, and then my question was, "When did you make those notes?"

MR. ALEXANDER: I have a possible solution. Tell me if I'm wrong. If the question is rephrased to ask when did you antipate litigation, were these notes made prior to that time, have I --

THE WITNESS: Well, they relate to the meeting where I was told that I was being

terminated, and I've told you that I did not make notes at the time that that meeting was going on and that I did make notes, so I think the only logical conclusion to draw or to be drawn is that those notes were made after that meeting, and I will be happy to furnish you or Judge Beatty, whichever you

choose, copies of those notes. As far as dates, as I sit here today, I cannot -- I mean, even if the Court directs me it's appropriate to give those dates, I cannot give you or Mr. Scism those dates.

MAGISTRATE FOSTER: Well --

THE WITNESS: Or my answer to his question right now would be I don't know the dates on which those notes were made.

MAGISTRATE FOSTER: But you understand that, because of this line of questioning, it may be necessary for the deposition,

once it's completed here this evening, to be brought back and for you to be recalled for further deposition?

THE WITNESS: I anticipate and I -- that because the attorneys that have entered their special appearance here have not had adequate time to prepare for this deposition, that the deposition will need to be continued for -- that cross -- or that the direct examination of me by my lawyers to be completed, and I anticipate being in Indiana

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